

No. 48011-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

In re Personal Restraint of:

TODD DALE PHELPS,

Petitioner.

Response to Personal Restraint Petition

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I. AUTHORITY FOR PETITIONER'S RESTRAINT

The State of Washington is the Respondent in this matter. Petitioner, Todd Dale Phelps, is restrained by authority of the judgment and sentence of the Lewis County Superior Court under cause number 11-1-00790-6. A copy of the judgment and sentence is attached to this petition as Appendix A.

II. RESPONSE TO PETITIONER'S CLAIMED GROUNDS FOR RELIEF

- A. The Deputy Prosecutor did not commit error when he used the word grooming in his closing argument as the term is within the common knowledge of the average juror and the concept does not require expert testimony.
- B. Phelps received effective assistance from his trial counsel throughout the pendency of his trial, including voir dire and the State's closing arguments.
- C. Phelps appellate counsel provided effective assistance on his direct appeal.

III. STATEMENT OF THE CASE

AA¹ was born on August 1, 1994 and has lived in the small town of Pe Ell,² Washington, since she was born. RP 431-32.³ AA is the daughter of Donna and Matthew and has two sisters, Ashley

¹ The victim, AA will be referred to by her initials. Everyone in AA's family will be referred to by their first name in order to protect AA's identity and avoid confusion, no disrespect intended.

² Pe Ell has approximately 670 residents. RP 1161

³ There are nine continuously numbered volumes for the jury trial (minus the voir dire), which will be referred to as RP. The voir dire will be cited to as VRP and the page number. Other hearings will have the date in the citation.

and Andrea. RP 36, 140. In the summer of 2010 AA played fastpitch on a select team as a pickup player. RP 37-38. Todd Phelps,⁴ was one of AA's fastpitch coaches. RP 433. Phelps' daughter, Angelina, is three years older than AA and also a fastpitch player. RP 1178-81. Angelina and AA became good friends. RP 1181. The select fastpitch team traveled extensively, and AA's parents could not travel with AA to the tournaments so AA went with the Phelps family. RP 444.

AA was having some personal issues over the summer of 2010, such as depression, cutting herself and she had tried marijuana and cocaine. RP 446. AA's relationship with her family was okay, though rocky at times. RP 444-46. AA liked spending time with the Phelps family and they became like a second family to AA. RP 444-46. AA looked up to Phelps as a father figure and a coach. RP 444-45.

In the fall of 2010 AA's mother discovered she was cutting herself and took AA to the doctor, who put AA on antidepressants and recommended AA see a counselor. RP 39-40, 447. Matthew reacted poorly when he found out AA was cutting and AA distanced herself from her dad. RP 142.

⁴ Todd Phelps will hereafter be referred to as Phelps and members of his family will be referred to by their first names to avoid confusion, no disrespect intended.

AA attended Pe Ell High School beginning fall 2010 and did not have contact with the Phelps family during that time. RP 41, 432, 439-40, 448. Fastpitch season began at the end of February or beginning of March 2011. RP 41, 449. Phelps was a paid employee of the Pe Ell school district as an assistant fastpitch coach until April 26, 2011. RP 300. At the start of fastpitch season AA's relationship with Phelps was a coach/player relationship. RP 449. AA began to confide in Phelps about some of her problems. RP 449-50.

Towards the end of March 2011, after attending a fastpitch game, AA and Phelps had a long conversation in the church parking lot in Pe Ell. RP 454. During this conversation Phelps told AA a number of dirty stories regarding Phelps' past sexual relationships with different woman. RP 457. Phelps told AA he was telling her this information because he had dirt on her and now she had dirt on him, that way AA could trust Phelps. RP 457. When Phelps dropped AA off at her house he told her to tell Donna that they had stopped to eat and that is why it took so long to get home. RP 468.

Phelps began texting with AA under the pretext that he wanted to make sure she was not cutting herself. RP 469. While

over at Phelps' house, a few days after the conversation in the church parking lot, Phelps asked to see the cuts on AA's legs. RP 470. To show Phelps the cuts AA had to pull her pants down. RP 472. When AA began to cry Phelps hugged her. RP 472. AA believed that Phelps was trying to help her and she tried to do what he told her to do, including breaking up with her boyfriend. RP 475.

AA went over to the Phelps' house on April 2, 2011. RP 482. Phelps told AA he was going to need to see the new cuts she had inflicted on herself. RP 481. AA showed Phelps the cuts on her thighs. RP 483-84. Phelps hugged AA pulling her on top of him. RP 483-84. Phelps pushed AA off and made a comment that he got sexually excited by her being on top of him. RP 486. Phelps then crawled on top of AA and began kissing her, eventually putting his tongue in her mouth. RP 487-88. AA was scared, but did not leave because Phelps was an important part of her life, she did not want to upset him or have him think less of her. RP 489. Phelps continued to kiss AA and then started grinding on her. RP 489-90. While clothed, Phelps rubbed his erect penis on AA's vagina. RP 490.

AA was not being truthful with her parents about her relationship and her contact with Phelps. RP 144-45, 472, 489.

Other adults were concerned about AA's relationship with Phelps and contacted AA's parents. RP 42-43, 185-86. On April 3, 2011 AA disclosed to Melody Porter⁵, the wife of the youth pastor, about the April 2nd kiss. RP 218, 499. Melody told AA the kiss was reportable and that she would report the kiss. RP 218.

On April 6, 2011 AA spent the night at the Phelps' house, sleeping on the couch with Angelina.⁶ RP 509-12. The morning of the seventh Angelina caught Phelps kissing AA. RP 514-15. Angelina told her friend, Haley Pace and Haley's mother, Kristin, about the kiss. RP 1457-58, 1464.

On April 13, 2011 the secret of the April 2nd kiss was revealed. RP 47-49, 219-20, 532-34. Melody told Kyle MacDonald, the superintendent of Pe Ell School District, that AA had "shared with me that Todd Phelps had kissed her on the cheek and it went to the lips and she was ashamed and felt uncomfortable because it didn't stop." RP 220. AA was upset Melody reported the kiss. RP 48-49. AA knew Phelps would be texting her so she took off to the bathroom with her iPod and deleted the texts off of it. RP 49-50, 535-36.

⁵ Melody and Ben Porter are both discussed in the transcript therefore the State will refer to each one by their first name to avoid confusion, no disrespect intended.

⁶ There is conflicting testimony whether AA spent a second night at the Phelps house that same week. RP 509-10, 1195.

Phelps was called into Mr. MacDonald's office on April 14, 2011. RP 304. Phelps admitted to being alone with AA and to texting AA. RP 305-07. Phelps was placed on administrative leave while an investigation was conducted. RP 302. Phelps and his wife had a meeting with AA's parents. RP 50. At the meeting Phelps disclosed a number of AA's secrets to her parents. RP 51, 145-47. Matthew and Donna made it clear that the only relationship they wanted Phelps to have with AA was as her coach and he was not permitted to text with her anymore. RP 52, 147. Phelps and Matthew went to Mr. MacDonald and Matthew explained how he did not believe Phelps should be fired and Phelps agreed not to text AA anymore. RP 147.

Phelps and AA continued to text daily. RP 549. On April 21, 2011 Phelps grabbed AA in the crotch/butt area while on the fastpitch bus. RP 563-66. On April 26, 2011, AA was caught by one of her teachers texting with Phelps. RP 260-61, 569. AA was called into the office and asked if she was still texting with Phelps and AA lied and denied it. RP 570. AA later admitted to Matthew she had been texting with Phelps. RP 148. Mr. MacDonald gave Phelps the option to resign or be terminated. RP 23. Phelps chose to resign. RP 323.

Matthew contacted Phelps and told Phelps, “he was to have absolutely no more contact with my daughter whatsoever.” RP 149. Phelps told Matthew he respected Matthew’s family and would abide by his wishes. RP 149. Phelps did not abide by those wishes. RP 149.

After AA’s parents took away her iPod and cellphone she and Phelps remained in contact using AA’s friends’ phones. RP 581. AA also gave Phelps her email password, which allowed Phelps to send AA emails from her own account. RP 585. Between May and July 14, 2011 AA had face-to-face contact with Phelps one time. RP 593. AA had contact with Phelps on July 14, 2011 while Mattie Miller was with her. RP 347-49, 596. The next contact AA had with Phelps, AA was with Kelsey Castro. RP 597.

On July 27, 2011 AA agreed to meet Phelps at Phelps’ brother, Dennis’, house. RP 629. Phelps forced AA to show him her cuts on her legs. RP 655. Phelps took off AA’s pants, began kissing her, and put his hands down the front of AA’s panties. RP 655-59. Phelps eventually removes AA’s panties, tells AA she can trust him and slides his hand up in between her legs and inserts a finger into her vagina. RP 662-63. Ultimately, Phelps pushed his penis inside AA’s vagina as she was telling him, “No. But Wait. I don’t want to

do this.” RP 678. Once the rape was over, AA collected her panties and pants and left. RP 680-86.

AA did not disclose the rape to her parents until September 24, 2011. RP 700. AA had been living with her aunt in Auburn and told her aunt about the rape. RP 699. AA’s aunt drove her down to Pe Ell so AA could tell her parents. RP 285-86. Matthew called the Sheriff’s Office on September 24, 2011 to report the rape. RP 158.

On November 10, 2011 the State charged Phelps by information with Count I, Rape in the Third Degree, and Count II, Sexual Misconduct with a Minor in the Second Degree. Appendix B. The State filed a third amended information which included a special allegation for Count I, alleging Phelps used his position of trust to facilitate the offense and that AA was a particularly vulnerable victim. Appendix C. Phelps elected to have his case tried in front of a jury of his peers. See RP.

During voir dire the State asked several jurors about what the term grooming meant to them. VRP 113-16. A number of the jurors readily discussed what the term meant to them. *Id.*

Phelps had four witnesses testify on his behalf, his mother, Jean Schmitt, Annette, Angelina, and his sister-in-law, Lisa. RP 1161, 1176, 1256, 1286. Ms. Schmitt testified as an alibi witness for

the April 2, 2011 incident. RP 1164-69. Ms. Schmitt testified that Phelps was with her all afternoon and evening and he was not on his phone because he was leaving it open so Annette could call him. RP 164-69. According to Ms. Schmitt the only time Phelps left her home was to pick up Angelina and then returned to Ms. Schmitt's house. RP 1164-65. Ms. Schmitt also testified that Phelps resigned from his fastpitch coaching position so he could save AA's life. RP 1175.

Angelina testified that she and AA had been good friends but AA's constant need for attention wears you out and their relationship began to dissolve in April 2011. RP 1181. Angelina denied seeing her dad kiss AA on April 7, 2011. RP 1234. Angelina also testified that on July 27, 2011 Phelps got home from work around 3:30 p.m., left, and was back home by 5:15 p.m. RP 1216. Angelina explained Phelps was home prior to Angelina and Annette leaving for Chehalis at 5:15 p.m. RP 1216-17. Angelina testified that when she returned about an hour later Phelps was mowing the lawn. RP 1217.

Lisa Phelps, who is married to Dennis, testified that she met Annette at the Starbucks in Chehalis on July 27, 2011 to go grocery

shopping in Olympia. RP 1257, 1271. When Lisa arrived back home nothing appeared out of place. RP 1273-74.

Annette testified that she did not believe the texting between Phelps and AA started prior to March 25, 2011. RP 1299. Annette also did not believe AA and Phelps texted after his resignation on April 26, 2011. RP 1216. Annette told the deputy prosecutor that she did not believe that Mattie Miller and AA met Phelps on July, 14, 2011. RP 1406. Annette said Phelps told her he resigned as coach because he did not want AA's problems publically aired. RP 1391.

Both Annette and Angelina admitted that they spoke to each other and Phelps while using receipts and a calendar to create a timeline of events in preparation for trial. RP 1220-21, 1330-34.

The State introduced a number of phone records to corroborate the dates and times AA stated she or others contacted Phelps and when AA's parents called her. RP 970-1026. The records show thousands of texts between Phelps and AA. RP 989-991. The State called Angelina's friend Haley Pace to rebut Angelina's statement that Angelina did not see her father kiss AA. RP 1458.

In closing argument the State revisited the term grooming, weaving it throughout its closing argument as a way to discuss the behavior exhibited by Phelps. RP 1493, 1506-07, 1509, 1513, 1517, 1520, 1522, 1537, 1542, 1548-49, 1588, 1591.

Phelps was convicted on both counts and the jury answered yes to both special verdicts. RP 1600. Phelps was sentenced to five years and 363 days in prison. Appendix A.

Phelps timely appealed his conviction. Appendix D. Phelps' appellate counsel raised numerous issues, all which the Court of Appeals found in favor of the State and affirmed Phelps's convictions. Appendix E. Phelps petitioned the Supreme Court for review of his case, which was denied. Appendix F. The Mandate was issued on January 16, 2015. Appendix G. Phelps now files this timely Personal Restraint Petition,

The State will further supplement the facts and record as necessary in its argument below.

IV. ARGUMENT

A. THE DEPUTY PROSECUTOR DID NOT COMMIT PROSECUTORIAL ERROR WHEN HE USED THE TERM GROOMING IN HIS CLOSING ARGUMENT TO THE JURY.

Phelps claims, for the first time in this petition, the deputy prosecutor committed prosecutorial error (misconduct)⁷ in his closing argument by using the term grooming. Phelps' argument is threefold, (1) evidence of grooming is per se inadmissible character evidence, (2) if, grooming is admissible it must be admitted through an expert, and (3) the introduction of grooming in the argument was both improper and prejudicial. Phelps' argument is without merit. The deputy prosecutor did not commit prosecutorial error in his

⁷ “‘Prosecutorial misconduct’ is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial.” *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public’s confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase “prosecutorial misconduct” for intentional acts, rather than mere trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), <http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf> (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term “prosecutorial misconduct” is an unfair phrase that should be retired. See, e.g., *State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutsch*, 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant’s arguments, the State will use the phrase “prosecutorial error.” The State will be using this phrase and urges this Court to use the same phrase in its opinions.

closing argument. If any error occurred it is harmless, Phelps has not met his burden in this petition to show that the error infected the verdict and he suffered actual and substantial prejudice.

1. Standard Of Review.

Appellate courts are reluctant to disturb convictions when a party has already had an opportunity to have their case reviewed on direct appeal. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 671, 327 P.3d 660 (2014). “Accordingly, a personal restraint petitioner must first establish by preponderance of the evidence that a constitutional error has resulted in actual and substantial prejudice.” *Cross*, 180 Wn.2d at 671 (internal citations omitted). If the alleged error is not of constitutional magnitude then the petitioner must show the court that there is “a fundamental defect resulting in a complete miscarriage of justice.” *Id.*, citing *In re Pers. Restraint Elmore*, 162 Wn.2d 236, 251, 172 P.3d 335 (2007).

The standard for review of claims of prosecutorial error on direct review is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). When reviewing prosecutorial error reviews on collateral attack “[t]he relevant question is whether the prosecutor’s comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” *Darden v.*

Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2646, 91 L. Ed. 2d 144 (1986), *citing Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). Further, “the appropriate standard of review for such a claim on writ of habeas corpus is the narrow one of due process, and not the broad exercise of supervisory power.” *Id.* (internal quotations omitted).

2. The Deputy Prosecutor Did Not Commit Error By Using the Word Grooming Throughout His Closing Argument.

A claim of prosecutorial error is waived if trial counsel failed to object and a curative instruction would have eliminated the prejudice. *State v. Belgrade*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). “[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by admonition to the jury.” *State v. Thorgerson*, 152 Wn.2d 438, 443, 258 P.3d 43 (2011), *citing State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (additional citations omitted).

To prove prosecutorial error, it is the defendant’s burden to show that the deputy prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances

at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). In regards to a prosecutor's conduct, full trial context includes, "the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011), *citing State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007(1998).

"[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

a. The deputy prosecutor properly argued the evidence as admitted to the trial court without objection.

The deputy prosecutor weaved the term grooming throughout his closing argument in an attempt to tie together the actions taken by Phelps, as testified to by the witnesses at trial. RP 1506-07, 1509-13, 1517-18, 1520, 1522, 1537-38, 1540, 1542, 1548, 1549. There was no objection to the deputy prosecutor's use of the term grooming during his closing argument. *Id.* Further, the term grooming was within the common understanding of the jury, as demonstrated during voir dire. VRP 113-17.

There was ample testimony about how Phelps worked to gain AA's trust and isolate her from her friends and family. Phelps also worked to put himself in a position of power and trust with AA's family as well. Phelps was in a position of authority and a father figure to AA. RP 444-45. Phelps began to get AA to confide in him. RP 449-50. Phelps began share sexual information with AA, but claiming it was a secret between them. RP 457. Phelps was texting with AA. RP 469. AA believed that Phelps was trying to help her, and she would show him her self-inflicted cuts, do what he said, and even break-up with her boyfriend because Phelps told her to. RP 470-72. AA communicated in secret with Phelps by instant

messaging and text messaging. RP 1033. On one device alone there was approximately 2,700 texts between AA and Phelps. RP 1116.

AA's father, Matthew, testified AA had gone on baseball trips with the Phelps family. RP 141. Matthew acknowledged his relationship with his daughter was strained, AA had been cutting herself and was depressed. RP 142. Phelps had a meeting with Matthew and his wife and discussed a number of secrets AA had apparently been confiding in Phelps. RP 145-46. Matthew told Phelps that he was to not have any further contact with AA, except as a coach/player relationship, Phelps was not to text AA anymore. RP 147. Matthew found out there was further texting. RP 148. Matthew also testified, "I believe his [,Phelps,] intentions were dishonorable. I believe he was grooming her to the end result of what he did. He ended up raping her on the 27th." RP 180.

The deputy prosecutor has wide latitude to draw reasonable inferences; that Phelps' actions concerning AA and her family were grooming, from the evidence presented and the deputy prosecutor may freely comment and argue it in his closing argument. *Lewis*, 156 Wn. App. at 240. The deputy prosecutor was not arguing facts not in evidence, as the behaviors the deputy prosecutor were

referencing throughout his closing argument were testified to (even Phelps in his petition does not claim otherwise). See RP 1506-07, 1509-13, 1517-18, 1520, 1522, 1537-38, 1540, 1542, 1548, 1549. There was testimony that, in at least one person's opinion, Phelps' conduct was grooming. RP 180.

i. Grooming is not per se inadmissible evidence in the State of Washington.

Contrary to Phelps' assertion, the use of the word grooming is not per se inadmissible character evidence. Phelps cites to *State v. Braham*, 67 Wn. App. 930, 841 P.2d 785 (1992) to support his premise that evidence regarding grooming is inadmissible. Petition 13-14. The facts and evidence presented in *Braham* are distinct from the facts and circumstances of Phelps' case. In *Braham* the allegation was that a three year old told her mother that Braham had touched her and when asked where he had touched her, the little girl pointed to her vagina. *Braham*, 67 Wn. App. at 931. The prosecutor sought to introduce regarding the grooming process in general. *Id.* at 932-33. The expert, who had no particular information about the victim, testified at length about a process of victimization, gradually sexualizing the child so they will not tell afterwards and a study that the expert had done recently about the victim-offender dynamics and relationships. *Id.* at 933-34. The

prosecutor did elicit testimony that Braham had a close relationship with the victim. *Id.* at 934. On appeal Braham argued the expert testimony of grooming was erroneously admitted and that it was actually profile testimony and unfairly prejudicial. *Id.*

The Court of Appeals in *Braham* did not hold that the word grooming could never be uttered by a witness, testimony about grooming was per se inadmissible, or that a prosecutor would never be free to argue that a defendant's actions were grooming. *Braham* cautions us against **expert** testimony that implies guilt based on characteristics of known offenders. *Braham*, 67 Wn. App. at 937. That type of testimony is "unduly prejudicial and therefore inadmissible." *Id.* That did not occur in Phelps' case. There was not testimony from an expert that these grooming behaviors are characteristics of sex offenders therefore Phelps must be guilty. Further, the Court in *Braham* stated, "We expressly refrain, however, from holding that such evidence will always be inadmissible." *Id.* at 939.

ii. The deputy prosecutor did not need to call an expert witness to use the term grooming in his closing argument.

There was no objection to Matthew's testimony that Phelps was grooming his daughter. RP 180. A number of jurors discussed the concept of grooming during voir dire. VRP 113-17.

MR. HALSTEAD: Now, has anyone here heard in the realm of sexual assault, rape, child molestation, anything like that, has anyone heard of the word grooming? Raise your hand, please.

Number 10, grooming, what does that mean to you?

JUROR NO. 10: Grooming, the context I'm thinking of is grooming of a victim to be assaulted.

MR. HALSTEAD: Okay. Can you elaborate a little bit for me?

JUROR NO. 10: Well, yeah. Spending time with the child or with the -- you know, with the victim, gaining trust of the victim, basically preparing the victim to make the next move.

...

JUROR NO. 8: Not really. I think it's a trust issue. You know, the victim trusts the person. That's how they get started.

MR. HALSTEAD: So it's a trust relationship.

JUROR NO. 8: Right.

MR. HALSTEAD: Until what point?

JUROR NO. 8: Until something happens that they distrust them. Something would have to happen to make --essentially with a child, you know, because children, they pretty much trust everybody.

...

JUROR NO. 9: Well, could establish a relationship with the family, doesn't have to be just the victim, be the victim's family, just get everybody to trust in you. Said something about a six-year-old before. If a six-year-old said they did this, number 3, nobody would believe them. This perpetrator has gained the trust of the people around the victim.

VRP 113-14.

The term groom can be found in many dictionaries. Under a broad definition it means, "to get into readiness for some specific objective." Webster's Third New International Dictionary, 1001. Which is exactly what Phelps was doing in this case, he was getting AA ready for an objective, to sexually assault her. A more refined definition in regards to the behavior and children can be found, "the criminal activity of becoming friends with a child, especially over the internet, in order to try to persuade the child to have a sexual relationship." Cambridge Advance Learners Dictionary & Thesaurus.⁸

Further, when a matter is within the competence and understanding of an ordinary lay person and jurors without special training or expertise can understand and evaluate the evidence presented, an expert's testimony would not be helpful and in some instances could cause the jury to rely too heavily on that testimony.

⁸ <http://dictionary.cambridge.org/us/dictionary/english/grooming> last visited 1/27/2016

State v. Green, 182 Wn. App. 133, 146, 328 P.3d 988 (2014); 5D K. Tegland, Wash. Prac., Evidence § 702.6, at 312-13 (2013). There is no requirement for expert testimony about grooming in this case, as evidenced by the discussion in voir dire. In 2012 the concept of grooming was of common understanding for the jurors.

iii. *State v. Akins* is not directly on point.

Contrary to Phelps' contention, the Kansas case of *State v. Akins* is not directly on point and does not support the Phelps' argument that the prosecutor in his case committed misconduct. See *State v. Akins*, 298 Kan. 592, 315 P.3d 868 (2014). In *Akins* the prosecutor did not call an expert or elicit testimony from any witnesses regarding grooming. *Akins*, 298 Kan. 592. The prosecutor then discussed grooming in her opening statement and her closing argument. *Id.* at 602-03. Specifically in her closing argument the prosecutor argued that "*The sexual intent comes from his grooming them...*" *Id.* at 603 (italics original). Sexual intent was an essential element of the crime the prosecutor must prove in order to convict Akins. *Id.* at 606.

The court in *Akins* discusses that it was improper for the prosecutor to discuss facts not in evidence, as there was no testimony regarding grooming. *Id.* at 605. The Kansas Supreme

Court also held that if the State sought to use grooming in the context it did, the testimony about the psychological condition needed to be admitted through an expert. *Id.* While this may be the standard now in Kansas, this is not the current standard in Washington, nor was it the standard at the time Phelps' case was tried by the State.

The misconduct found in *Akins* was twofold, (1) the prosecutor argued facts not in evidence, and (2) the prosecutor's "argument Akins's earlier alleged grooming also satisfies the essential element of sexual intent at the time of the alleged criminal conduct." *Id.* at 605-06. Neither applies in Phelps' case. The deputy prosecutor was not arguing facts not in evidence, as there was testimony regarding grooming, albeit not from an expert. The deputy prosecutor did not argue that grooming met an essential element of either of the crimes the State alleged Phelps had committed. See RP 1486-1553, 1580-92. There was no error on the deputy prosecutor's part.

iv. The deputy prosecutor did not commit error when he used the term grooming as applied to the facts as testified to in this case.

The deputy prosecutor is allowed to argue the evidence as testified to by the witnesses. He is allowed to argue his theory of

the case and make reasonable inferences from the evidence. This is advocacy, not error, and a deputy prosecutor has wide latitude to draw these reasonable inferences from the evidence in his closing argument. *Lewis*, 156 Wn. App. at 240.

The jury was also properly instructed in this case. Appendix H. Jurors are instructed that they must decide a case based upon the evidence that was presented at trial and accept the law as given in the jury instructions. WPIC 1.02. Jurors are also instructed that a lawyer's remarks, arguments or statements are not evidence, the law is contained in the instructions and the jury must disregard any statement, argument or remark by the lawyer that is not supported by the law in the instructions or the evidence. WPIC 1.02. A jury is presumed to follow the jury instructions. *State v. Yates*, 161 Wn.2d 714, 163, 168 P.3d 359 (2007) (citations omitted).

The deputy prosecutor took Phelps' conduct, as testified to by the witnesses, and argued to the jurors that Phelps was systematically singling out, befriending, manipulating, isolating, incrementally sexualizing, controlling and ultimately sexually assaulting and raping AA. RP 1493-1522, 1537-42, 1548-49. The deputy prosecutor began with stating:

Then we talked about grooming. And some people came up with examples of how someone who is grooming is going to be nice. They are going to try to get the trust of someone. They are going to try to isolate that person so that they can do an act against this person who is being groomed, but it's other people that are around as well that are being groomed.

Let's start with the facts of the case. And I know you are all familiar with them....

RP 1493. The deputy prosecutor then proceeds to summarize the testimony regarding AA's relationship with Phelps, her cutting activity, their text messaging, Phelps oversharing very personal information with AA, Phelps telling AA about his sexual experiences, telling AA to lie to her parents about why she is late, Phelps talking to other people about AA's virginity, and more. RP 1493-1506. The deputy prosecutor then draws inferences from the testimony that the actions of the defendant, the physical contact between this coach and athlete, are grooming. RP 1506. This is permissible argument.

The deputy prosecutor was not arguing a syndrome or that a certain characteristic/profile made Phelps guilty of raping AA or committing sexual misconduct. The deputy prosecutor's argument using the word "grooming" was to explain the behavior of Phelps, how he manipulated everyone, how he sought to single out, win

over and victimize AA. The testimony of Phelps' actions was clear. He singled out AA. He made it appear to all on the outside, her family and others, that he was attempting to help this student athlete, when in reality, he was priming her to be his victim, which was evidenced by the rape the sexual misconduct and the rape that occurred in July.

The deputy prosecutor's closing argument was not improper. The deputy prosecutor argued the facts that were introduced into evidence and reasonable inferences from those facts. The deputy prosecutor argued the correct standard of the law and did not reduce or shift the burden of proof. There was no prosecutorial error.

3. Phelps Has Not Met His Burden To Show He Was Denied Due Process As A Result Of The Deputy Prosecutor's Alleged Misconduct.

While not conceding error, if there was any error, Phelps has not met his burden on this review. Phelps, as petitioner in this collateral attack, must show that the prosecutor's improper comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Wainwright*, 477 U.S. at 181 (internal quotations omitted). Phelps must establish, by a preponderance of the evidence, that he has suffered actual and

substantial prejudice. *Cross*, 180 Wn.2d at 671. Phelps has not, and cannot, meet this burden.

Phelps argues this case has conflicting evidence and therefore the term grooming, with its negative connotation of a sexual predator, made the jury convict Phelps on the characteristic that he was using this grooming behavior and therefore must be a sexual offender. This ignores the mountain of evidence that was presented.

The totality of the evidence in this case was so overwhelming. This was not a he said, she said case. The State presented testimony from the victim and other witnesses, there were voluminous phone records corroborating dates and times, and there was rebuttal testimony calling into question Angelina and Annette's testimony. Phelps cannot show that the prosecutor's use of the word "grooming" in closing argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. He has not met his burden and this Court should dismiss this petition.

B. PHELPS CANNOT MEET HIS BURDEN TO SHOW HIS TRIAL COUNSEL WAS INEFFECTIVE, THEREFORE, HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM FAILS.

Phelps asserts his counsel was ineffective for failing to object to (1) the State's discussion of grooming during voir dire and (2) the use of the concept of grooming during the State's closing argument. Petition 20-22. Phelps' trial counsel provided competent, effective representation throughout the trial. Phelps' claim of ineffective assistance of counsel therefore fails.

1. Standard Of Review.

In a personal restraint petition, petitioner bears the burden of showing prejudicial error. *In re Gronquist*, 138 Wn.2d 388, 396, 978 P.2d 1083 (1990).

2. Phelps Must Show His Trial Counsel's Performance Was Deficient And He Was Prejudiced By The Deficient Performance.

To prevail on an ineffective assistance of counsel claim Phelps must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, citing *State v.*

McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland*, 466 U.S. at 694.

As argued above, evidence of grooming is not inadmissible in Washington. There was evidence of grooming presented to the jurors and the deputy prosecutor's closing argument was proper. There was nothing improper about the discussion during voir dire. An attorney need not object to admissible evidence or proper

procedure. There was nothing deficient about Phelps' trial attorneys' performance. Phelps has not met his burden to show prejudicial error and his petition should therefore be dismissed.

C. PHELPS CANNOT MEET HIS BURDEN TO SHOW HIS APPELLATE COUNSEL WAS INEFFECTIVE.

Phelps argues his appellate counsel was ineffective for failing to raise the grooming issue he presents in this petition. Petition 23-24. Phelps again fails to meet his burden and his claim of ineffective assistance of appellate counsel fails.

It has long been understood that an effective appellate lawyer should exercise discretion in bringing issues before the court.

The "process of 'winnowing out weaker arguments ... and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." *Smith v. Murray*, 477 U.S. 527, 536, 106 S. Ct. 2661, 2667, 91 L.Ed.2d 434 (1986) (quoting *Jones v. Barnes*, 463 U.S. 745, 751-52, 103 S. Ct. 3308, 3313, 77 L.Ed.2d 987 (1983)). Here, appointed counsel has thrown the chaff in with the wheat, ignoring their duty under RPC 3.1 to present only meritorious claims and contentions and leaving it for this court to cull the small number of colorable claims from the frivolous and repetitive. ... We hereby provide notice that such behavior will not be tolerated in the future.

Matter of Pers. Restraint of Lord, 123 Wn.2d 296, 302-03, 868 P.2d 835, decision clarified *sub nom. In re Pers. Restraint Petition of*

Lord, 123 Wn.2d 737, 870 P.2d 964 (1994). Thus, it follows that not all conceivable issues must be included in an appellate brief.

Effective assistance of counsel is guaranteed by both the federal and state constitutions. See. U.S. Const. amend. VI; Const. art. I, § 22. It is well-settled that to demonstrate ineffective assistance of counsel, a defendant must show two things: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). A failure to make either showing requires dismissal of the claim. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The same standard applies to claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285-86, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000).

Review of counsel's performance starts with the strong presumption that counsel acted reasonably. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Counsel has a duty to

research relevant law. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *Strickland*, 466 U.S. at 690-91), and to investigate all reasonable lines of defense. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 744, 101 P.3d 1 (2004) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). Importantly, “[i]n assessing performance, the court must make every effort to eliminate the distorting effects of hindsight.” *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (quoting *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086, cert. denied, 506 U.S. 958 (1992)). Ineffective assistance of counsel is a fact-based determination that is “generally not amenable to per se rules.” *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.

Strickland, 466 U.S. at 696.

Moreover, an attorney’s failure to raise novel legal theories or arguments is not ineffective assistance. See, e.g., *Anderson v. United States*, 393 F.3d 749, 754 (8th Cir.) (“Counsel’s failure to

raise [a] novel argument does not render his performance constitutionally ineffective”), *cert. denied*, 546 U.S. 882 (2005); *Haight v. Commonwealth*, 41 S.W.3d 436, 448 (Ky.) (“while the failure to advance an established legal theory may result in ineffective assistance of counsel under *Strickland*, the failure to advance a novel theory never will”), *cert. denied*, 534 U.S. 998 (2001), *overruled on other grounds by Leonard v. Commonwealth*, 279 S.W.3d 151 (Ky.2009). Similarly, counsel is effective even if she does not anticipate changes in the law. *State v. Grimes*, 165 Wn. App. 172, 192, 267 P.3d 454 (2011) (trial counsel’s failure to challenge widely-accepted jury instruction later disapproved by the supreme court was not ineffective assistance of counsel); *State v. Brown*, 159 Wn. App. 366, 372, 245 P.3d 776 (2011) (collecting several cases). *See also Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir. 1991) (trial counsel was not ineffective for failing to raise a voir dire challenge under *Batson v. Kentucky*, 476 U.S. 79, 96, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), two days before *Batson* was decided, because reasonable conduct is viewed in accordance with the law at the time of conduct); *Knowles v. Mirzayance*, 556 U.S. 111, 129 S. Ct. 1411, 173 L. Ed. 2d 251 (2009) (defense counsel’s performance was not deficient when he counseled defendant to

abandon NGI claim that stood almost no chance of success even though defendant asserted that he had “nothing to lose” by making the claim); *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983) (counsel assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every nonfrivolous issue requested by the defendant, if counsel, as a matter of professional judgment, decides not to present those issues). Counsel has no duty to pursue strategies that are not reasonably likely to succeed. *McFarland*, 127 Wn.2d at 334 n.2.

Phelps’ appellate counsel raised six different issues on his direct appeal. Appendix D. Appellate counsel briefed open courts, right to presence, deficient notice, a unanimous verdict issue, prosecutorial error and ineffective assistance of counsel. Appendix D. Appellate counsel argued prosecutorial error during closing argument, but did not argue the grooming issue because appellate counsel has no duty to pursue a strategy that is not reasonably likely to succeed. As argued above, there was nothing improper with the deputy prosecutor’s use of the term grooming. Therefore, appellate counsel was not ineffective for failing to raise the issue on appeal. Phelps has not met his burden to show his appellate

counsel was ineffective, his claim fails and his petition should be dismissed.

V. CONCLUSION

Phelps has not met his required burden in this petition. The deputy prosecutor did not commit prosecutorial error by using the term grooming throughout his closing argument. Phelps received effective assistance from his trial counsel and his appellate counsel. This Court should dismiss Phelps' petition.

RESPECTFULLY submitted this 28th day of January, 2016.

JONATHAN MEYER
Lewis County Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'J. Meyer', written over a horizontal line.

by: _____
SARA I. BEIGH, WSBA 35564
Attorney for the Respondent.

Appendix A

Judgment and Sentence

Received & Filed
LEWIS COUNTY, WASH
Superior Court

JUN 08 2012

By Kathy A. Brack, Clerk
Deputy

ORIGINAL

Superior Court of Washington
Lewis County

State of Washington, Plaintiff,

vs.

TODD DALE PHELPS, Defendant.
DOB: 09/11/1959
WADL: PHELPTD4110J

No. 11-1-00790-6
Felony Judgment and Sentence --
Prison
☒ RCW 9.94A.507 Prison Confinement
(Sex Offense)
(FJS)
☒ Clerk's Action Required, para 2,1, 4.1, 4.3a, 4.3b,
5.2, 5.3, 5.5 and 5.7
☐ Defendant Used Motor Vehicle
☐ Juvenile Decline ☐ Mandatory ☐ Discretionary

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the undersigned (deputy) prosecuting attorney were present.

II. Findings

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon
☐ guilty plea (date) _____ ☒ jury-verdict (date) 4/27/12 ☐ bench trial (date) _____ as
charged in the Third Amended Information:

Count	Crime	RCW (w/subsection)	Class	Date of Crime
I.	RAPE 3 RD DEGREE WITH AGGRAVATORS: POSITION OF TRUST, PARTICULARLY VUNERABLE VICTIM	9A.44.060 9.94A.535(3)(b) & (n)	FC	On or about 7/27/11
II.	SEXUAL MISCONDUCT WITH A MINOR 2 ND DEGREE	9A.44.096	GM	On or about and between 3/25/11 through 4/3/11

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)

(If the crime is a drug offense, include the type of drug in the second column.)

☐ Additional current offenses are attached in Appendix 2.1a.

Felony Judgment and Sentence (FJS) (Prison)
(Sex Offense and Kidnapping of a Minor Offense)
(RCW 9.94A.500, .505)(WPF CR 84.0400
(07/2011))

Page 1 of 13

LEWIS COUNTY
PROSECUTING ATTORNEY
345 W. Main Street, 2nd Floor
Chehalis, WA 98532
360-740-1240 (Voice) 360-740-1497 (Fax)

12-9-913-2

- ☐ The defendant is a sex offender subject to indeterminate sentencing under **RCW 9.94A.507**.
The jury returned a special verdict or the court made a special finding with regard to the following:
- ☐ The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.602, 9.94A.533.
- ☐ The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____. RCW 9.94A.602, 9.94A.533.
- ☐ For the crime(s) charged in Count _____, **domestic violence** was pled and proved. RCW 10.99.020.
- ☐ The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____. RCW 9.94A.839.
- ☐ The offense was predatory as to Count _____. RCW 9.94A.836.
- ☐ The victim was under 15 years of age at the time of the offense in Count _____. RCW 9.94A.837.
- ☐ The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838, 9A.44.010.
- ☐ The defendant acted with **sexual motivation** in committing the offense in Count _____. RCW 9.94A.835.
- ☐ This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- ☐ Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- ☐ The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- ☐ Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a minor in order to involve that **minor** in the commission of the offense. RCW 9.94A.833.
- ☐ Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A.____.
- ☐ The defendant committed ☐ **vehicular homicide** ☐ **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- ☐ Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- ☐ In Count _____ the defendant has been convicted of assaulting a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault, as provided under RCW 9A.36.031, and the defendant intentionally committed the assault with what appeared to be a firearm. RCW 9.94A.831, 9.94A.533.
- ☐ Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW 46.20.285.
- ☐ The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.

☐ In Count _____, assault in the 1st degree (RCW 9A.36.011) or assault of a child in the 1st degree (RCW 9A.36.120), the offender used force or means likely to result in death or intended to kill the victim and shall be subject to a mandatory minimum term of 5 years (RCW 9.94A.540).

☐ Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589).

☐ Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

<i>Crime</i>	<i>Cause Number</i>	<i>Court (county & state)</i>	<i>DV*</i> <i>Yes</i>
1.			
2.			

* DV: Domestic Violence was pled and proved.

☐ Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

<i>Crime</i>	<i>Date of Crime</i>	<i>Date of Sentence</i>	<i>Sentencing Court (County & State)</i>	<i>A or J Adult, Juv.</i>	<i>Type of Crime</i>	<i>DV*</i> <i>Yes</i>
1 None						
2						
3						
4						
5						

* DV: Domestic Violence was pled and proved.

☐ Additional criminal history is attached in Appendix 2.2.

☐ The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.

☐ The prior convictions listed as number(s) _____, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525)

☐ The prior convictions listed as number(s) _____, above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

<i>Count No.</i>	<i>Offender Score</i>	<i>Seriousness Level</i>	<i>Standard Range (not including enhancements)</i>	<i>Plus Enhancements*</i>	<i>Total Standard Range (including enhancements)</i>	<i>Maximum Term</i>
I.	0	V	6-12 months	n/a	6-12 months	5 years
II.	n/a	GM	0-364 days	n/a	0-364 days	364 days

- * (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9), (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude, (ALF) assault law enforcement with firearm, RCW 9.94A.533(12).

[] Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended **sentencing agreements or plea agreements** are [] attached [] as follows: _____.

2.4 [X] Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

[] below the standard range for Count(s) _____.

[X] above the standard range for Count(s) I _____.

[] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

[X] Aggravating factors were [] stipulated by the defendant, [] found by the court after the defendant waived jury trial, [X] found by jury, by special interrogatory.

[] within the standard range for Count(s) _____, but served consecutively to Count(s) _____. Findings of fact and conclusions of law are attached in Appendix 2.4. [] Jury's special interrogatory is attached. The Prosecuting Attorney [X] did [] did not recommend a similar sentence.

2.5 Legal Financial Obligations/Restitution. The court has considered the total amount owing, the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. (RCW 10.01.160). The court makes the following specific findings:

[] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753): _____.

[] The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is **guilty** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 [] The court **dismisses** Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

4 yrs and 363 ^{days} months on Count I 364 ^{DAYS} months on Count II
_____ months on Count _____ _____ months on Count _____
_____ months on Count _____ _____ months on Count _____

[] The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.

[] The confinement time on Count _____ includes _____ months as enhancement for [] firearm [] deadly weapon [] sexual motivation [] VUCSA in a protected zone [] manufacture of methamphetamine with juvenile present [] sexual conduct with a child for a fee. Actual number of ~~months~~^{YEARS} of total confinement ordered is: 5 YEARS AND 363 DAYS. All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: Count II, Sexual Misconduct with a Minor 2nd degree, a gross misdemeanor

The sentence herein shall run consecutively with the sentence in cause number(s) _____

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____

- (b) **Confinement.** RCW 9.94A.507 (Sex Offenses only): The court orders the following term of confinement in the custody of the DOC:
- | | | |
|-------------|---------------------|--|
| Count _____ | minimum term: _____ | maximum term: <u>Statutory Maximum</u> |
| Count _____ | minimum term: _____ | maximum term: <u>Statutory Maximum</u> |
- (c) **Credit for Time Served.** The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served unless otherwise stated here: 43 days.
- (d) [] **Work Ethic Program.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for remaining time of confinement.

4.2 Community Custody. (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

(A) The defendant shall be on community custody for the longer of:

- (1) the period of early release. RCW 9.94A.728(1)(2); or
(2) the period imposed by the court, as follows:

Count(s) I ^{ONE DAY} ~~36 months~~ Sex Offenses
Count(s) _____ 36 months for Serious Violent Offenses
Count(s) _____ 18 months for Violent Offenses
Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

(Sex offenses, only) For count(s) I, sentenced under RCW 9.94A.507, for any period of time the defendant is released from total confinement before the expiration of the statutory maximum.

The combined term of community confinement and community custody shall not exceed the maximum statutory sentence on any count.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) for sex offenses, submit to electronic monitoring if imposed by DOC; and (10) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody. For sex offenders sentenced under RCW 9.94A.709, the court may extend community custody up to the statutory maximum term of the sentence.

The court orders that during the period of supervision the defendant shall:

☒ consume no alcohol.

☒ have no contact with: Amanda Alden

☐ remain ☐ within ☐ outside of a specified geographical boundary, to wit:

☒ not reside within 880 feet of the facilities or grounds of a public or private school (community protection zone). RCW 9.94A.030; 9.94A.703(1)(c) (to impose this condition, the Court finds the victim of the offense was under eighteen years of age at the time of the offense).

☐ participate in the following crime-related treatment or counseling services:

☐ undergo an evaluation for treatment for ☐ domestic violence ☐ substance abuse

☐ mental health ☐ anger management, and fully comply with all recommended treatment and abide by all rules, restrictions, and requirements of all recommended treatment program(s).

☐ comply with the following crime-related prohibitions: _____

☒ Other conditions: Defendant shall have no criminal law violations. Defendant shall have law abiding behavior. Defendant shall abide by all conditions and requirements in Appendix H (attached). Defendant shall follow all conditions, rules, and requirements of DOC. Defendant shall obtain a sexual deviancy evaluation and comply with any recommended treatment. Defendant shall abide by all restrictions, requirements, and rules of his sexual deviancy treatment program, as well as any other court-ordered treatment programs. Defendant shall not frequent locations where minors are known to congregate unless approved by CCO and sexual deviancy treatment provider. Defendant shall submit to urinalysis and/or breathalyzer testing at the request of CCO. Defendant shall not possess or view any sexually explicit material as defined in RCW 9.68.130(2) unless approved by CCO and sexual deviancy treatment provider. Defendant shall not have any contact with minor children unless approved by CCO and sexual deviancy treatment provider. Defendant shall not hold any position of trust or authority over minor children unless approved by CCO and sexual deviancy treatment provider. Defendant shall submit to polygraph examinations at the direction of DOC and his sexual deviancy treatment provider and shall provide non-deceptive answers. Defendant shall not develop any romantic relationship with another person who has minor children in their care or custody without the approval of CCO and sexual deviancy treatment provider. The conditions of community custody are effective upon entry of this Judgment and Sentence per RCW 9.94A.707(2).

(C) For sentences imposed under RCW 9.94A.507, the Indeterminate Sentence Review Board may impose other conditions (including electronic monitoring if DOC so recommends). In an emergency, DOC may impose other conditions for a period not to exceed seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3a Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE

<i>PCV</i>	\$ <u>500.00</u>	Victim assessment	RCW 7.68.035
<i>PDV</i>	\$ _____	Domestic Violence assessment	RCW 10.99.080
<i>CRC</i>	\$ <u>1,376.81</u>	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee \$ <u>200.00</u>	FRC
		Witness costs \$ <u>485.81</u>	WFR
		Sheriff service fees \$ <u>691.00</u>	SFR/SFS/SFW/WRF
		Jury demand fee \$ _____	JFR
		Extradition costs \$ _____	EXT
		Other \$ _____	
<i>PUB</i>	\$ _____	Fees for court appointed attorney	RCW 9.94A.760
<i>WFR</i>	\$ _____	Court appointed defense expert and other defense costs	RCW 9.94A.760
<i>CLF</i>	\$ _____	Crime lab fee [] suspended due to indigency	RCW 43.43.690
	\$ <u>100.00</u>	DNA collection fee	RCW 43.43.7541
<i>FPV</i>	\$ _____	Specialized Forest Products	RCW 76.48.140
	\$ _____	Other fines or costs for: _____	
	\$ <u>1,000.00</u>	Lewis County Jail Fee Reimbursement	RCW 9.94A.760(2)
<i>RTN/RJN</i>	\$ _____	Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI, only, \$1000 maximum)	RCW 38.52.430
		Agency: _____	
<i>RTN/RJN</i>	\$ <u>TBD</u>	Restitution to: _____	
	\$ <u>TBD</u>	Restitution to: _____	
	\$ <u>TBD</u>	Restitution to: _____	

(Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)

\$ 2,976.81 **Total** RCW 9.94A.760

[X] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[X] shall be set by the prosecutor.

[] is scheduled for _____ (date).

[X] The defendant waives any right to be present at any restitution hearing (sign initials):_____.

[] **Restitution** Schedule attached.

[] Restitution ordered above shall be paid jointly and severally with:

Name of other defendant Cause Number (Victim's name) (Amount-\$)

RJN

[X] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[X] All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 25.00 per month commencing sixty days after entry of this Judgment and Sentence. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

[] The court orders the defendant to pay costs of incarceration at the rate of \$_____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760. (This provision does not apply to costs of incarceration collected by DOC under RCW 72.09.111 and 72.09.480.)

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.3b [] Electronic Monitoring Reimbursement. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of \$_____.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. This paragraph does not apply if it is established that the Washington State Patrol crime laboratory already has a sample from the defendant for a qualifying offense. RCW 43.43.754.

[X] **HIV Testing.** The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

[X] The defendant shall not have contact with Amanda Alden _____ (name) including, but not limited to, personal, verbal, telephonic, written or contact through a third party until _____ (which does not exceed the maximum statutory sentence).

[X] The defendant is excluded or prohibited from coming within 500 feet (distance) of:

[X] Amanda Alden (name of protected person(s))'s [X] home/ residence

[X] work place [X] school [] (other location(s)) _____, or

[] other location: _____,
until _____ (which does not exceed the maximum statutory sentence).

[X] A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 **Other:** Defendant shall have no criminal law violations. Defendant shall have law-abiding behavior.

All conditions of community custody are incorporated as conditions of the sentence.

4.7 **Off-Limits Order.** (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

V. Notices and Signatures

5.1 **Collateral Attack on Judgment.** If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **Community Custody Violation.**

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5 **Firearms.** You may not own, use or possess any firearm, and under federal law any firearm or ammunition, unless your right to do so is restored by the court in which you are convicted or the superior

court in Washington State where you live, and by a federal court if required. **You must immediately surrender any concealed pistol license.** (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9A.1.040 and RCW 9A.1.047.

5.6 Sex and Kidnapping Offender Registration. RCW 9A.44.128, 9A.44.130, 10.01.200.

1. General Applicability and Requirements: Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.128, you are required to register.

If you are a resident of Washington, you must register with the sheriff of the county of the state of Washington where you reside. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of the state of Washington where you will be residing.

If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of your school, where you are employed, or where you carry on a vocation.

2. Offenders Who are New Residents or Returning Washington Residents: If you move to Washington or if you leave this state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state.

3. Change of Residence Within State: If you change your residence within a county, you must provide, by certified mail, with return receipt requested or in person, signed written notice of your change of residence to the sheriff within three business days of moving. If you change your residence to a new county within this state, you must register with the sheriff of the new county within three business days of moving. Also within three business days, you must provide, by certified mail, with return receipt requested or in person, signed written notice of your change of address to the sheriff of the county where you last registered.

4. Leaving the State or Moving to Another State: If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within three business days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. If you move out of the state, you must also send written notice within three business days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): You must give notice to the sheriff of the county where you are registered within three business days:

- i) before arriving at a school or institution of higher education to attend classes;
- ii) before starting work at an institution of higher education; or

iii) after any termination of enrollment or employment at a school or institution of higher education.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within three business days of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within three business days after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register with the sheriff of the new county not more than three business days after entering the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You must keep an accurate accounting of where you stay during the week and provide it to the county sheriff upon request. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within three business days of the entry of the order. RCW 9A.44.130(7).

5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.8 Other: Any bail or bond previously posted in this case is hereby exonerated.

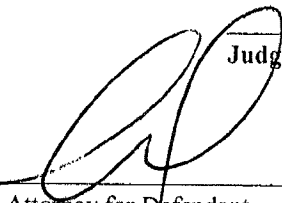
Done in Open Court and in the presence of the defendant this date: JUNE 8, 2012



Deputy Prosecuting Attorney

WSBA No. 36606

Print Name: Debra Eurich



Attorney for Defendant

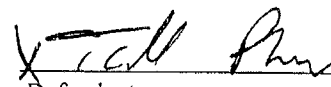
WSBA No. 24637

Print Name: Don Blair



Judge/Print Name:

Nelson E. Hunt



Defendant

Print Name: Todd Dale Phelps

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: X [Signature]

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the _____ language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) _____, (state) _____, on (date) _____.

Interpreter

Print Name

VI. Identification of the Defendant

SID No.:

(If no SID complete a separate Applicant card
(form FD-258) for State Patrol)

Date of Birth: 09/11/1959

FBI No.:

Local ID No. _____

PCN No. _____

Other _____

Alias name, DOB: _____

Height: _____. Weight: _____. Hair: _____. Eyes: _____.

Race:

Ethnicity:

Sex:

☐ Asian/Pacific Islander

☐ Black/African-American

☐ Caucasian

☐ Hispanic

☐ Male

☐ Native American

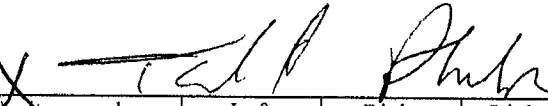
☐ Other: _____

☐ Non-Hispanic

☐ Female

Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court, Deputy Clerk, _____ Dated: _____

The defendant's signature: 

Left four fingers taken simultaneously

Left
Thumb

Right
Thumb

Right four fingers taken simultaneously



*Felony Judgment and Sentence (FJS) (Prison)
(Sex Offense and Kidnapping of a Minor Offense)
(RCW 9.94A.500, .505)(WPF CR 84.0400
(07/2011))*

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COUNTY
PROSECUTING ATTORNEY
345 W. Main Street, 2nd Floor
Chehalis, WA 98532
360-740-1240 (Voice) 360-740-1497 (Fax)

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS**

STATE OF WASHINGTON]	Cause No.: 11-1-00790-6
]	
	Plaintiff	
	v.	JUDGEMENT AND SENTENCE (FELONY)
Phelps, Todd Dale		APPENDIX H
	Defendant	COMMUNITY PLACEMENT / CUSTODY
]	
DOC No. 357684]	

The court having found the defendant guilty of offense(s) qualifying for community placement, it is further ordered as set forth below.

COMMUNITY PLACEMENT/CUSTODY: Defendant additionally is sentenced on convictions herein, for each sex offense and serious violent offense committed on or after June 6, 1996 to community placement/custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150 (1) and (2) whichever is longer; and on conviction herein for an offense categorized as a sex offense or serious violent offense committed on or after July 1, 1990, but before June 6, 1996, to community placement for two years or up to the period of earned release awarded pursuant to RCW 9.94A.150 (1) and (2) whichever is longer; and on conviction herein for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, to a one-year term of community placement.

Community placement/custody is to begin either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of early release.

(a) **MANDATORY CONDITIONS:** Defendant shall comply with the following conditions during

11-1-00790-6
Phelps, Todd Dale 357684
Page 1 of 3

the term of community placement/custody:

- (1) Report to and be available for contact with the assigned Community Corrections Officer as directed;
- (2) Work at Department of Corrections' approved education, employment, and/or community service;
- (3) Not consume controlled substances except pursuant to lawfully issued prescriptions;
- (4) While in community custody not unlawfully possess controlled substances;
- (5) Pay supervision fees as determined by the Department of Corrections;
- (6) Receive prior approval for living arrangements and residence location;
- (7) Defendant shall not own, use, or possess a firearm or ammunition when sentenced to community service, community supervision, or both (RCW 9.94A, 120 (13));
- (8) Notify community corrections officer of any change in address or employment; and
- (9) Remain within geographic boundary, as set fourth in writing by the Community Corrections Officer.

WAIVER: The following above-listed mandatory conditions are waived by the Court:

(b) **OTHER CONDITIONS:** Defendant shall comply with the following other conditions during the term of community placement / custody:

- 1) The defendant shall submit to a sexual deviancy evaluation with a therapist approved by the Community Corrections Officer, and follow all treatment recommendations.
- 2) The defendant shall have no contact with minor-aged children without prior approval from the Community Corrections Officer and/or treatment provider.
- 3) The defendant shall hold no position of authority or trust involving minor-aged children.
- 4) The defendant shall not enter into any relationship with persons who have minor-aged children in their custody or care without prior approval of the Community Corrections Officer and/or treatment provider.
- 5) The defendant shall not possess or view Sexually Explicit Material as defined by RCW 9.68.130.
- 6) The defendant shall not use or possess alcohol and/or controlled substances during the period of community custody.
- 7) The defendant shall have no contact (directly or indirectly - which includes no contact by mail, telephone, or through third parties) with the victim, A.K.A. - DOB 8/1/94, without prior approval of the Community Corrections Officer and/or treatment provider.
- 8) The defendant shall submit to polygraph testing and provide non-deceptive polygraphs at the

11-1-00790-6

Phelps, Todd Dale 357684

Page 2 of 3

request of the Community Corrections Officer and/or treatment provider, and the defendant shall submit to plethysmograph testing at the request of the treatment provider as well.

9) The defendant shall submit to random Urinalysis and Breathalyzer as directed by the assigned Community Corrections Officer.

10) The defendant shall have no access to or contact with the internet, social networks, or a computer in any way as instructed by the assigned Community Corrections Officer and/or treatment provider.

11) The defendant must consent to allow home visits by DOC to monitor compliance with supervision. Home visits will include access for purposes of visual inspection of all areas of the residence in which the offender lives or has exclusive or joint control or access.

12) The defendant shall obtain a Chemical Dependency evaluation and follow all recommended treatment.

6/8/2012
DATE

Nelson E. Hunt
JUDGE, LEWIS COUNTY SUPERIOR COURT

Nelson E. Hunt

11-1-00790-6

Phelps, Todd Dale 357684

Page 3 of 3

Appendix B

Information

CLERK OF COURT
LEWIS COUNTY, WASH.
REC'D & FILED
2011 NOV 16 PM 4:55
KATHY BRAGG, CLERK
BY [Signature]
DEPUTY

IN THE SUPERIOR COURT OF WASHINGTON IN AND
FOR LEWIS COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

TODD DALE PHELPS,

Defendant.

No.11-1-00790-6

INFORMATION

COMES NOW JONATHAN L. MEYER, Prosecuting Attorney of Lewis County, State of Washington, or his deputy, and by this Information accuses the above-named defendant of violating the laws of the State of Washington as follows:

Count I
Rape in the Third Degree

On or about July 27, 2011, in the County of Lewis, State of Washington, the above-named defendant engaged in sexual intercourse with another person who was not married to the defendant to-wit: A.K.A. (DOB: 08/01/1994), and A.K.A. (DOB: 08/01/1994) did not consent to the sexual intercourse and such lack of consent was clearly expressed by A.K.A.'s words or conduct, and/or under circumstances where there was a threat of substantial unlawful harm to property rights of A.K.A. (DOB: 08/01/1994); contrary to the Revised Code of Washington 9A.44.060(1).

(MAXIMUM PENALTY—Five (5) years imprisonment and/or a \$10,000 fine pursuant to RCW 9A.44.060(2) and 9A.20.021(1)(c), plus restitution and assessments.)

JIS Code: 9A.44.060 Rape 3

INFORMATION

Page 1 of 3

LEWIS COUNTY
PROSECUTING ATTORNEY
345 W. Main Street, 2nd Floor
Chehalis, WA 98532
360-740-1240 (Voice) 360-740-1497 (Fax)

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Count II
Sexual Misconduct With a Minor in the Second Degree

On or about April 2, 2011, in the County of Lewis, State of Washington, the above-named defendant, (a) being at least sixty (60) months older than the victim and being in a significant relationship to and not being married to A.K.A. (DOB: 08/01/1994), (DOB: A.K.A. (DOB: 08/01/1994), and not being in a state registered domestic partnership with A.K.A. (DOB: 08/01/1994), (DOB: A.K.A. (DOB: 08/01/1994)), did have, or knowingly cause another person under the age of eighteen (18) years to have, sexual intercourse with another person who is at least sixteen (16) years old but less than eighteen (18) years old, to-wit: A.K.A. (DOB: 08/01/1994), and did abuse a supervisory position within that relationship in order to engage in or cause another person under the age of eighteen (18) to engage in sexual contact with A.K.A. (DOB: 08/01/1994), and/or (b) being at least sixty (60) months older than the student and being a school employee and not being married to the student and not being in a state registered domestic partnership with the student, did have, or knowingly cause another person under the age of eighteen (18) to have, sexual contact with a registered student of the school who is at least sixteen (16) years old to-wit: A.K.A. (DOB: 08/01/1994); contrary to the Revised Code of Washington 9A.44.096.

(MAXIMUM PENALTY—364 days in jail and/or a \$5,000 fine pursuant to RCW 9A.44.096(2) and RCW 9A.20.021(2), plus restitution and assessments.)

(SEX OFFENDER REGISTRATION—A person who has been found to have committed or has been convicted of Sexual Misconduct With a Minor in the Second Degree in violation of RCW 9A.44.096, or who has been found not guilty by reason of insanity under chapter 10.77 RCW of committing Sexual Misconduct With a Minor in the Second Degree in violation of RCW 9A.44.096, shall register with the county sheriff as required by RCW 9A.44.130.)

JIS Code: 9A.44.096 Sexual Misconduct with a Minor - 2

DATED: November 10, 2011.

JONATHAN L. MEYER
Prosecuting Attorney


DEBRA S. EURICH, WSBA #36606
DEPUTY PROSECUTING ATTORNEY

1 **DEFENDANT INFORMATION**

2 **NAME: Todd Dale Phelps**

3 **DOB: 09/11/1959**

4 **ADDRESS: 228 Pe Ell Ave /PO Box 218**

5 **CITY, STATE, ZIP: Pe Ell, WA**

6 **PHONE #(s):**

7 **FBI #**

8 **SID#**

9 **LEA# 11C-11472**

10 **SEX: M**

11 **RACE: W**

12 **HGT: 600**

13 **WGT: 215**

14 **EYES:**
15 **BRN**

16 **HAIR: GRY**

17 **OTHER IDENTIFYING INFORMATION**

28 INFORMATION

29 Page 3 of 3

30 LEWIS COUNTY
PROSECUTING ATTORNEY
345 W. Main Street, 2nd Floor
Chehalis, WA 98532
360-740-1240 (Voice) 360-740-1497 (Fax)

Appendix C

Third Amended Information

Received & Filed
LEWIS COUNTY, WASH
Superior Court

APR 24 2012

By Kathy A. Brack, Clerk
Deputy



IN THE SUPERIOR COURT OF WASHINGTON IN AND
FOR LEWIS COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

TODD DALE PHELPS,

Defendant.

No.11-1-00790-6

THIRD AMENDED INFORMATION

COMES NOW JONATHAN L. MEYER, Prosecuting Attorney of Lewis County, State of Washington, or his deputy, and by this Information accuses the above-named defendant of violating the laws of the State of Washington as follows:

Count I

Rape in the Third Degree

On or about July 27, 2011, in the County of Lewis, State of Washington, the above-named defendant engaged in sexual intercourse with another person who was not married to the defendant to-wit: A.K.A. (DOB: 08/01/1994), and A.K.A. (DOB: 08/01/1994) did not consent to the sexual intercourse and such lack of consent was clearly expressed by A.K.A.'s words or conduct, and/or under circumstances where there was a threat of substantial unlawful harm to property rights of A.K.A. (DOB: 08/01/1994); contrary to the Revised Code of Washington 9A.44.060(1).

(MAXIMUM PENALTY—Five (5) years imprisonment and/or a \$10,000 fine pursuant to RCW 9A.44.060(2) and 9A.20.021(1)(c); plus restitution and assessments.)

JIS Code: 9A.44.060 Rape 3

Third Amended Information

Page 1 of 4

LEWIS COUNTY
PROSECUTING ATTORNEY
345 W. Main Street, 2nd Floor
Coehalis, WA 98532
360-740-1240 (Voice) 360-740-1497 (Fax)

Count I

**Special Allegation—Aggravating Circumstance—Position of Trust and Particularly
Vulnerable Victim**

AND FURTHERMORE, the defendant used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense. Also, the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance, contrary to RCW 9.94A.535(3)(b)(n).

Count II

Sexual Misconduct With a Minor in the Second Degree

On or about and between March 25, 2011 through April 3, 2011, in the County of Lewis, State of Washington, the above-named defendant, (b) being at least sixty (60) months older than the student and being a school employee and not being married to the student and not being in a state registered domestic partnership with the student, did have, or knowingly cause another person under the age of eighteen (18) to have, sexual contact with a registered student of the school who is at least sixteen (16) years old to-wit: A.K.A. (DOB: 08/01/1994); contrary to the Revised Code of Washington 9A.44.096.

(MAXIMUM PENALTY—364 days in jail and/or a \$5,000 fine pursuant to RCW 9A.44.096(2) and RCW 9A.20.021(2), plus restitution and assessments.)

(SEX OFFENDER REGISTRATION—A person who has been found to have committed or has been convicted of Sexual Misconduct With a Minor in the Second Degree in violation of RCW 9A.44.096, or who has been found not guilty by reason of insanity under chapter 10.77 RCW of committing Sexual Misconduct With a Minor in the Second Degree in violation of RCW 9A.44.096, shall register with the county sheriff as required by RCW 9A.44.130.)

JIS Code: 9A.44.096 Sexual Misconduct with a Minor – 2

1
2 DATED: April 23, 2012.

3 JONATHAN L. MEYER
4 Prosecuting Attorney

5 Debra Eurich
6 DEBRA S. EURICH, WSBA #36606
7 DEPUTY PROSECUTING ATTORNEY
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1 **DEFENDANT INFORMATION**

2 **NAME: Todd Dale Phelps**

3 **DOB: 09/11/1959**

4 **ADDRESS: 228 Pe Ell Ave /PO Box 218**

5 **CITY, STATE, ZIP: Pe Ell, WA**

6 **PHONE #(s):**

7 **FBI #**

8 **SID#**

9 **LEA# 11C-11472**

10 **SEX: M**

11 **RACE: W**

12 **HGT: 600**

13 **WGT: 215**

14 **EYES:**
15 **BRN**

16 **HAIR: GRY**

17 **OTHER IDENTIFYING INFORMATION**

Appendix D

Appellant's Opening Brief

No. 43557-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Todd Phelps,

Appellant.

Lewis County Superior Court Cause No. 11-1-00790-6

The Honorable Judge Nelson E. Hunt

Appellant's Opening Brief

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Manek R. Mistry
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ASSIGNMENTS OF ERROR

1. The trial court violated Mr. Phelps's First, Sixth, and Fourteenth Amendment right to an open and public trial.
2. The trial court violated Mr. Phelps's right to an open and public trial under Wash. Const. art. I, §10 and 22 .
3. The trial court violated the constitutional requirement of an open and public trial by holding portions of jury selection outside the public's view.
4. The trial court violated the constitutional requirement of an open and public trial by holding additional proceedings in chambers.
5. The trial court violated Mr. Phelps's Sixth and Fourteenth Amendment right to be present by holding a portion of jury selection in his absence.
6. Mr. Phelps's conviction as to count two violated his constitutional right to adequate notice of the charges against him under the Sixth Amendment and Wash. Const. art. I, §22.
7. Count two of the charging document omitted an essential element of second-degree sexual misconduct with a minor.
8. The Information was deficient as to count two because it failed to allege that Mr. Phelps had sexual contact with a student who was under 21 years of age.
9. Mr. Phelps's state constitutional right to a unanimous jury was violated as to count two when the state failed to elect a particular act to prove that he had sexual contact with A.A.
10. Mr. Phelps's state constitutional right to a unanimous jury was violated as to count two when the judge failed to give a unanimity instruction for that charge.
11. The prosecutor committed prejudicial misconduct that violated Mr. Phelps's Fourteenth Amendment right to due process.

12. The prosecutor improperly expressed a personal opinion in closing arguments, in violation of Mr. Phelps's right to due process under the Fourteenth Amendment and Wash. Const. art. I, §3.
13. The prosecutor improperly "testified" in violation of Mr. Phelps's right to a jury trial and his right to a decision based solely on the evidence under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §3, 21, and 22.
14. Mr. Phelps was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
15. Defense counsel was ineffective for failing to object to prosecutorial misconduct in closing argument.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions require that criminal trials be administered openly and publicly. Here, the trial judge questioned and excused prospective jurors behind closed doors, and met with counsel in chambers on numerous occasions. Did the trial judge violate the constitutional requirement that criminal trials be open and public by holding closed proceedings without first conducting any portion of a *Bone-Club* analysis?
2. An accused person has the constitutional right to be present at all critical stages of trial, including jury selection. In this case, the court questioned and excused prospective jurors outside the courtroom in Mr. Phelps's absence. Did the trial judge violate Mr. Phelps's right to be present under the Sixth and Fourteenth Amendments and under Wash. Const. art. I, §22?
3. A criminal Information must set forth all of the essential elements of an offense. In count two, the Information failed to allege that Mr. Phelps had sexual contact with a student who was less than 21 years old. Did the Information omit essential elements of the charged crime in violation of Mr. Phelps's right

to adequate notice under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §22?

4. When evidence of multiple criminal acts is introduced to support a single conviction, the court must give a unanimity instruction unless the prosecution elects a single act upon which to proceed. Here, the state introduced evidence that Mr. Phelps may have had sexual contact with A.A. on multiple occasions during the charging period, but failed to elect a single act as the basis for the charge in count two. Did the trial court's failure to give a unanimity instruction violate Mr. Phelps's state constitutional right to a unanimous verdict?
5. A prosecutor may not express a personal opinion or "testify" to facts not in evidence. Here, the prosecutor "testified" to facts not in evidence, expressed a personal opinion, and made unconstitutional arguments suggesting Mr. Phelps had tailored his defense to the evidence after it was presented. Did the prosecutor commit reversible misconduct that was flagrant and ill-intentioned, in violation of Mr. Phelps's state and federal constitutional rights to a jury trial, to due process, to be present during trial, and to confront his accusers?
6. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, counsel failed to object to prejudicial misconduct during the prosecuting attorney's closing. Was Mr. Phelps denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Todd Phelps was an assistant coach for the Pe Ell girls fastpitch softball team, and had been for 17 years (as of 2010). RP¹ 39, 298, 433, 1556. The team's season was in the spring, but there was also a select team that played in tournaments over the summer. RP 37-38, 1290.

In the summer of 2010, Mr. Phelps took his family and members of the team to various games and tournaments most weekends. One of the players that often traveled with the family was A.A. RP 37-39, 432, 440, 1290-1297. She was 16 and had a strained relationship with her own parents. RP 38, 41-42, 84-89, 105, 123, 142, 178, 222, 239, 535, 539, 719.

A.A. cut herself, experienced depression, resisted taking her anti-depression medication, lied to her parents frequently, contemplated suicide more than once, and generally preferred the company of the Phelps family. RP 39-41, 49-50, 99-101, 110, 113, 161, 226, 363, 379, 446, 517, 719. She often spent the night with Mr. Phelps's daughter Angelina who was 2 years older and tutored A.A. in math. RP 42, 184, 384, 438, 445, 509, 518.

¹ Citations to the trial will be RP, as those pages are consecutively numbered. All other citations to the transcripts will include the date.

After that summer season was over, A.A. rarely saw the Phelps family until the start of the school fastpitch season in February of 2011. RP 448. A.A. was continuing to have a difficult relationship with her family, and once the season started, she confided to Mr. Phelps that she had been cutting herself and had considered suicide. In late March, Mr. Phelps and A.A. talked in his truck in the parking lot of a church after watching a game. RP 450, 579, 695, 767-768.

Once Mr. Phelps learned of A.A.'s challenges, he worked to keep A.A. from self-harm and tried to help her improve her self-esteem. A.A. did not readily discuss her issues with adults, with the exception of Mr. Phelps. They developed a relationship that included phone calls and frequent texts, even late into the night. RP 469, 549, 984-1003, 1308. Mr. Phelps contacted several people to express his concerns about A.A., including A.A.'s mother, the head fastpitch coach, the other assistant coach, the pastor at A.A.'s church as well as the pastor's wife, and Mr. Phelps's own wife. RP 45-46, 50, 110-112, 188, 202, 205, 214, 217, 230, 245-6, 1298.

The first week of April, A.A. told her pastor's wife that Mr. Phelps had kissed her. While stories differed on where, how, and when, school authorities were notified of the allegation. RP 119, 144, 153-154, 218-220, 247, 269, 301, 306, 501, 513-516, 540, 1234, 1464.

While the school's investigation regarding the kiss was ongoing, Mr. Phelps met with A.A. and her parents. RP 50-51, 302. The two families agreed that Mr. Phelps should not lose his coaching job because he was trying to help A.A. RP 147, 314. The school agreed, and directed Mr. Phelps to have no further contact with A.A. via text or phone except as related to his coaching duties. RP 315-319. Mr. Phelps continued to have frequent contact with A.A. despite this directive, and later resigned his coaching job as a result. RP 64, 260-261, 300, 320-323, 984-1003.

In September of 2011, A.A. moved to her aunt's home near Fife. RP 131, 696. After being there a few weeks, she told her aunt (and then her parents) that she had sex with Mr. Phelps in July. RP 283, 286.

A police investigation led to charges of Rape in the Third Degree (with the allegation that Mr. Phelps held a position of trust and that A.A. was a particularly vulnerable victim) and Sexual Misconduct with a Minor in the Second Degree. CP 42-45 With respect to the second charge, the Information read:

On or about July 27, 2011, in the County of Lewis, State of Washington, the above-named individual engaged in sexual intercourse with another person who was not married to the defendant to-wit: A.K.A (DOB: 08/01/1994), and A.K.A. (DOB: 08/01/1994) did not consent to the sexual intercourse and such lack of consent was clearly expressed by A.K.A's words or conduct, and/or under circumstances where there was a threat of substantial unlawful harm to property rights of A.K.A. (DOB: 08/01/1994); contrary to the Revised Code of Washington 9A.44.060(1).

CP 43.

A list of prospective jurors was prepared for use during *voir dire*. Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. Juror 62 was a handwritten addition to the list. Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. During jury selection, Juror 62 indicated there was a reason he "should not be allowed to serve" on the case. RP (4/17/12 *voir dire*) 8. He also indicated that he'd read or heard something about the case, and had formed opinions that would affect his ability to be fair and impartial. RP (4/17/12 *voir dire*) 9. He answered yes when asked if he was acquainted with the parties, the attorneys, or the prospective witnesses. RP (4/17/12 *voir dire*) 9.

The prosecutor questioned Juror 62, who revealed that he lived in Pe Ell and knew "almost every person" on the witness list. RP (4/17/12 *voir dire*) 20-21. After a few additional questions, the court interrupted, and spoke directly with Juror 62:

THE COURT: Juror 62 was actually excused from this case earlier and I thought he knew that. You're Mr. Kephart; is that right?

JUROR NO. 62: Yes, sir.

THE COURT: Yes.

JUROR NO. 62: I was. But you also told me I had to come and go through the process, so I'm here.

THE COURT: I think we had a miscommunication. But you told me all of those things and I thought... Well, at any rate, [you're] excused today --

JUROR NO. 62: Thank you.

THE COURT: -- so you can leave.

JUROR NO. 62: Appreciate it.
RP (4/17/12 voir dire) 21-23.

There is no further indication of the record of when (or where) the court had spoken with Juror 62, or whether any other jurors had been excused outside the courtroom prior to the start of *voir dire*. RP (4/17/12 voir dire) 2-128; Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP.

Juror 28 and Juror 48 were questioned in open court during *voir dire*. RP (4/17/12 voir dire) 5, 25, 106; Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. They were excused at some point; however, the record does not reflect when, where, how, or why this occurred. Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. Nor does the record indicate whether or not either party objected. *See* RP (4/17/12 voir dire) *generally*.

Throughout the trial, there were references to proceedings that occurred outside the courtroom. The judge heard motions *in limine* in his chambers. RP (4/10/12) 9; *see also* RP (4/13/12) 3. The court also met with counsel in chambers prior to jury selection, and ruled on preliminary matters such as the procedures and time limits for *voir dire* and the need for alternate jurors. RP 3. Later in the trial, the parties met with the judge in chambers and discussed issues relating to A.A.'s journal. RP 627.

Another *in camera* meeting occurred following the defense case. RP 1427.

At trial, A.A. testified that during the season before Mr. Phelps had resigned, he'd kissed her on three separate occasions, rubbed her upper thigh, grabbed her crotch and butt, and pulled her on top of him three different times. RP 474, 483, 487, 512-513, 519, 526, 528-530, 566. She also stated that during the incident in which she alleged sexual intercourse, she shrugged when asked if they would have sex, and that she told the investigating officer that she never said no. RP 871-879.

The court did not instruct the jury with respect to the multiple possible acts that could comprise sexual misconduct, and the state did not elect one. Court's Instructions to Jury, Supp. CP; RP 1474-1553. In his closing argument, the prosecutor referred to all of the alleged sexual incidents that occurred during the fastpitch season, but did not elect one. RP 1501-1509.

In his closing argument, the defense attorney argued different theories supporting not guilty findings, including that if sexual intercourse had occurred in July, A.A. had consented to it. RP 1571. The prosecutor stated in his rebuttal that he was not aware until he heard it that the defense would claim that A.A. consented. RP 1580. He also

characterized the defense strategy as “grasping at straws.” RP 1582.

There was no defense objection. RP 1580-1583.

The jury voted to convict on both counts, and answered “yes” to the special verdict. Verdict Form A, Supp. CP; Special Verdict, Supp. CP; Verdict Form B, Supp. CP. After sentencing, Mr. Phelps timely appealed. CP 237.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE CONSTITUTIONAL REQUIREMENT THAT CRIMINAL TRIALS BE OPEN AND PUBLIC.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, ___ Wn.2d ___, ___, 291 P.3d 876 (2012). Whether a trial court procedure violates the right to a public trial is a question of law reviewed *de novo*. *State v. Njonge*, 161 Wn. App. 568, 573, 255 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on review. *Id.* at 576.

B. The constitution requires that criminal trials be open and public.

Criminal cases must be tried openly and publicly. *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, 558 U.S. 209, ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010) (*per curiam*).

Proceedings to which the public trial right attaches may be closed only if the trial court enters appropriate findings following a five-step balancing process. *Bone-Club*, at 258-259.

The public trial right attaches to a particular proceeding when “experience and logic” show that the core values protected by the right are implicated. *State v. Sublett*, ___ Wn.2d ___, ___, ___ P.3d ___ (2012). A reviewing court first asks “whether the place and process have historically been open to the press and general public,” and second, “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.* at ___ (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7-8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986)). If the place and process have historically been open and if public access plays a significant positive role, the public trial right attaches and closure is improper unless justified under *Bone-Club*.

The Supreme Court has yet to allocate the burden of proof when it comes to showing what occurred during a closed *in camera* proceeding. However, the court has provided some guidance: where the record shows the likelihood of a closure (in the form of “the plain language of the trial court’s ruling impos[ing] a closure”), the burden shifts to the state “to overcome the strong presumption” that a closure actually occurred. *State v. Brightman*, 155 Wn.2d 506, 516, 122 P.3d 150 (2005).

Similarly, the state should bear the burden of establishing that a closed proceeding does not implicate the core values of the open trial right. The prosecutor has an incentive to ensure that guilty verdicts are upheld, and is therefore the natural candidate to bear responsibility for putting on the record anything that transpired during a closed proceeding.² Thus, in this case, the burden should rest with the prosecution to establish what occurred outside of the courtroom. *See Brightman* (addressing state's burden once closure shown).

- C. The trial court erroneously closed a portion of jury selection by questioning and dismissing jurors behind closed doors.

The state and federal Supreme Courts have repeatedly affirmed that the public trial right attaches to jury selection. *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009); *State v. Brightman*, at 515; *Presley*, at _____. A reviewing court need not apply the “experience and logic” test to jury selection, because it is well-settled that the public trial right applies. *State v. Wise*, ____ Wn.2d. ____, 288 P.3d 1113 (2012); *see also In re Morris*, ____ Wn.2d. ____, 288 P.3d 1140 (2012) (Chambers, J., concurring).

² Similarly, if a closed proceeding does implicate the core values of the public trial right, the prosecution should ensure that the court considers the five *Bone-Club* factors.

Where a portion of jury selection is unnecessarily closed, reversal is automatic. *Strode*, at 231 (plurality); *Presley*, at ____.

Here, the record suggests that jurors were questioned and excused behind closed doors.³ RP (4/17/12 voir dire) 2-128; Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. This became clear during the examination of Juror 62. During *voir dire*, Juror 62 acknowledged that he'd already been questioned and excused by the judge for reasons related to the case⁴ (although a miscommunication resulted in his appearance for *voir dire*.) RP (4/17/12 voir dire) 21-23. Unlike other jurors who were excused, Juror 62's name did not appear on the printed struck juror list; instead, it was handwritten at the end of the list. This suggests there may have been other similarly situated persons whose names did not even appear on the list. *See* Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. In addition, Juror 28 and Juror 48 were questioned in open court, but the record does not reflect how or when they were excused. RP (4/17/12 voir dire) 5, 25, 106; *See* Struck Juror List (Clerk's Trial Minutes

³ Whether this occurred in chambers, in the clerk's office, or in the hallway, the public trial right was violated. *See State v. Leyerle*, 158 Wn. App. 474, 483-84, 242 P.3d 921 (2010).

⁴ The colloquy between the judge and Juror 62 made clear that the earlier questioning and decision to excuse the juror related directly to the facts of the case, rather than illness or unrelated hardship. RP (4/17/12 voir dire) 21-23.

(4/17/12)), Supp. CP. This suggests that they, too, were excused behind closed doors, possibly during a recess.

By excusing jurors for case-related reasons outside the public's view, the court violated the constitutional requirement that criminal trials be administered openly. U.S. Const. Amend. VI, U.S. Const. Amend. XIV; Wash. Const. art. I, §10 and 22; *Bone-Club*, *supra*. Accordingly, Mr. Phelps's convictions must be reversed and the case remanded for a new trial. *State v. Paumier*, ___ Wn.2d. ___, 288 P.3d 1126 (2012).

- D. The trial court erroneously held additional *in camera* hearings without undertaking *Bone-Club* analysis.

As the Supreme Court noted, “[t]he resolution of legal issues is quite often accomplished during an adversarial proceeding...” *Sublett*, at _____. Traditionally, adversarial proceedings have been open to the public. *See, e.g., Press-Enterprise* at 13 (addressing preliminary hearing in California); *United States v. Simone*, 14 F.3d 833 (3d Cir. 1994) (granting public access to post-trial examination of juror for misconduct); *United States v. Smith*, 787 F.2d 111, 114 (3d Cir. 1986) (granting public access to transcripts of sidebar and *in camera* rulings); *United States v. Criden*, 675 F.2d 550, 552 (3d Cir. 1982) (granting public access to transcript of

pretrial hearing held *in camera*). By contrast, the public trial right is less likely to attach to *ex parte* or nonadversarial matters.⁵

In keeping with this history, the experience prong suggests that proceedings must be open and public if they are adversarial in any way. Furthermore, where the record fails to establish what happened during a closed-door session, the hearing should be presumed to be adversarial. *See Brightman, supra* (allocating the burden on the issue of closure).

Open court proceedings are essential to proper functioning of the judicial system; this is especially true for hearings that have an adversarial tone, or for those that offer a possibility of prejudice to either party. Opening the courtroom doors to the public promotes public understanding of the judicial system, encourages fairness, provides an outlet for community sentiment, ensures public confidence that government (including the judiciary) is free from corruption, enhances the performance of participants, and (where evidence is taken) discourages perjury. *See Criden, at 556* (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)). Each of these benefits

⁵ *See, e.g., In re Search of Fair Finance*, 692 F.3d 424, 430 (6th Cir. 2012) (refusing public access to search warrant documents); *United States v. Gonzales*, 150 F.3d 1246, 1257 (10th Cir. 1998) (refusing public access to indigent defendants' *ex parte* requests for public funds).

accrues when the public, the press, and any interested parties have a full opportunity to observe every aspect of a proceeding.

Here, the judge and counsel met *in camera* on several occasions. RP (4/13/12) 3; RP 3-5, 627, 1427. Although the court gave a brief of summary of certain closed proceedings, no record was made of the proceedings themselves. RP (4/13/12) 3; RP 3-5, 627, 1427.

The public was unable to observe arguments made by the attorneys, concerns expressed by the judge, the demeanor of the participants, and the means by which the ultimate decisions were reached. Mr. Phelps, any family members, the press, and other interested spectators were likely unaware that proceedings were even taking place, and had no opportunity to play the important role secured to them when proceedings are open.

Furthermore, the absence of a complete record should be held against the prosecution. Without evidence of what actually occurred in chambers, it is fair to presume that the *in camera* proceedings had an adversarial tone. *Brightman, supra*.

Under these circumstances, experience and logic suggest that the closed hearings should have been open to the public. The trial court's decision to close the courtroom violated both Mr. Phelps's constitutional rights and those of the public. U.S. Const. Amend. VI, U.S. Const.

Amend. XIV; Wash. Const. art. I, §10 and 22; *Bone-Club*, *supra*.

Accordingly, his conviction must be reversed and the case remanded for a new trial. *Id.*

II. THE TRIAL COURT VIOLATED MR. PHELPS'S RIGHT TO BE PRESENT BY EXCUSING JURORS IN MR. PHELPS'S ABSENCE.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *McDevitt*, at ____.

B. Mr. Phelps's conviction must be reversed because the trial judge violated his Fourteenth Amendment right to be present at all critical stages of trial.

A criminal defendant has a constitutional right to be present at all critical stages of a criminal proceeding. *U.S. v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *State v. Pruitt*, 145 Wn. App. 784, 788, 797-799, 187 P.3d 326 (2008). This right stems from the Sixth Amendment's confrontation clause and from the Fourteenth Amendment's due process clause. *Gagnon*, at 526.

Although the core of this privilege concerns the right to be present during the presentation of evidence, due process also protects an accused person's right to be present whenever "whenever his [or her] presence has a relation, reasonably substantial, to the fulness [sic] of his [or her] opportunity to defend against the charge." *Id.* Accordingly, "the

constitutional right to be present at one's own trial exists 'at any stage of the criminal proceeding that is critical to its outcome if [the defendant's] presence would contribute to the fairness of the procedure.'" *U.S. v. Tureseo*, 566 F.3d 77, 83 (2d Cir. 2009) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 745, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)).

The right to be present encompasses jury selection. This allows the accused person "to give advice or suggestion or even to supersede his lawyers." *Snyder v. Massachusetts*, 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934). Furthermore, "[a]s Blackstone points out, 'how necessary it is that a prisoner ... should have a good opinion of his jury the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for his dislike.'" *U.S. v. Gordon*, 829 F.2d 119, 124 (D.C. Cir. 1987) (quoting 4 W. Blackstone, *Commentaries on the Laws of England*, 353 (1765)).

In this case, Mr. Phelps was denied his Fourteenth Amendment right to be present during a critical stage of the proceedings. At some point, the trial court questioned and excused jurors outside the courtroom. RP (4/17/12 voir dire) 21-23; Struck Juror List (Clerk's Trial Minutes (4/17/12)), Supp. CP. The trial court's decisions affected the makeup—and hence the fairness—of the jury that presided over Mr. Phelps's fate.

Excusing jurors for case-related reasons is functionally equivalent to excusing them for answers given during *voir dire*. The court's decision to question and excuse jurors in Mr. Phelps's absence violated his Fourteenth Amendment right to be present. *Gordon, supra*; *Gagnon, supra*. His conviction must be reversed and the case remanded for a new trial. *Id.*

III. MR. PHELPS'S CONVICTION FOR SEXUAL MISCONDUCT VIOLATED HIS RIGHT TO ADEQUATE NOTICE UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ART. I, §22.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *McDevitt, at ____*. A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id, at 105*. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id, at 105-106*.

If the Information is deficient, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wn. App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). On the other hand, if the missing element can be found by fair construction of

the charging language, reversal is required only upon a showing of prejudice. *Kjorsvik*, at 104-106.

- B. The Information was deficient as to count two because it failed to allege the essential elements of the charged crime.

The Sixth Amendment to the federal constitution guarantees an accused person the right “to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI.⁶ A similar right is secured by the Washington State Constitution. Wash. Const. art. I, §22. All essential elements—both statutory and nonstatutory—must be included in the charging document. *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992). An essential element is “one whose specification is necessary to establish the very illegality of the behavior.” *Id* (citing *United States v. Cina*, 699 F.2d 853, 859 (7th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)).

A conviction for second-degree sexual misconduct with a minor requires proof that the accused person “is a school employee who has, or knowingly causes another person under the age of eighteen to have, sexual contact with an enrolled student of the school who is at least sixteen years old *and not more than twenty-one years old* and not married to the

⁶ This right is guaranteed to people accused in state court, through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Cole v. Arkansas*, 333 U.S. 196, 201, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

employee, if the employee is at least sixty months older than the student...” RCW 9A.44.096(1)(b) (emphasis added). An essential element thus requires proof that the registered student is not more than 21 years old.

In this case, the Information did not include this element. It included two references to age—age 16 and age 18. CP 43. Nowhere in the charging language did the prosecution make clear that the state was required to prove that the registered student was under age 21. CP 43.

Because the Information is deficient, the conviction violated Mr. Phelps’s right to notice under the Sixth Amendment and art. I, §22. *Kjorsvik*, at 104-106. The conviction must be reversed and the case dismissed without prejudice. *Id.*

IV. MR. PHELPS’S CONVICTION FOR SEXUAL MISCONDUCT VIOLATED HIS RIGHT TO A UNANIMOUS VERDICT UNDER ART. I, §21.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *McDevitt*, at _____. A manifest error affecting a constitutional right may be raised for the first time on review.⁷ RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203

⁷ In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

B. The state constitution guarantees an accused person the right to a unanimous verdict.

An accused person has a state constitutional right to a unanimous jury verdict.⁸ Wash. Const. art. I, §21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). If the prosecution presents evidence of multiple acts, then either the state must elect a single act or the court must instruct the jury to agree on a specific criminal act. *Id.*, at 511.

⁸ The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

In the absence of an election, failure to provide a unanimity instruction is presumed to be prejudicial.⁹ *Coleman*, at 512; *see also State v. Vander Houwen*, 163 Wn.2d 25, 38, 177 P.3d 93 (2008). Without the election or instruction, each juror's guilty vote might be based on facts that her or his fellow jurors believe were not established. *Coleman*, at 512.

Failure to provide a unanimity instruction requires reversal unless the error is harmless beyond a reasonable doubt. *Coleman*, at 512. The presumption of prejudice is overcome only if no rational juror could have a reasonable doubt about any of the alleged criminal acts. *Id.*, at 512.

- C. The absence of a unanimity instruction requires reversal of the conviction in count two, because the prosecution relied on evidence of multiple acts.

The state presented evidence that Mr. Phelps had sexual contact with A.A. on multiple occasions. In particular, A.A. testified that Mr. Phelps kissed her on three separate occasions, rubbed her upper thigh, grabbed her crotch and butt, and pulled her on top of him three different times. RP 474, 483, 487, 512-513, 519, 526, 528-530, 566.

⁹ Accordingly, the omission of a unanimity instruction is a manifest error affecting a constitutional right, and can be raised for the first time on appeal. RAP 2.5(a); *State v. Greathouse*, 113 Wn. App. 889, 916, 56 P.3d 569 (2002).

The prosecutor did not identify a particular act as the basis for count two. Instead, in closing, the prosecutor referenced more than one occasion on which Mr. Phelps allegedly had sexual contact with A.A. RP 1501-1506.

The court did not give a unanimity instruction as to count two. This violated Mr. Phelps's constitutional right to a unanimous jury, and gives rise to a presumption of prejudice.¹⁰ *Coleman*, at 511-512.

In the absence of an election or a unanimity instruction, a divided jury might have voted to convict. Some jurors may have believed Mr. Phelps had sexual contact with A.A. at his house, while others believed sexual contact occurred on the bus but not at the house. RP 474, 483, 487, 512-513, 519, 526, 528-530, 566.

Because Mr. Phelps may have been convicted by a jury divided in this manner, his conviction cannot stand. Count two must be reversed and the charge remanded for a new trial. *Coleman*, at 511. If the same evidence is presented on retrial, the state must elect a single act as the basis for the charge or the court must give a unanimity instruction. *Id.*

¹⁰ As a matter of law, it creates a manifest error affecting a constitutional right, and thus can be reviewed for the first time on appeal. RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 103, 217 P.3d 756 (2009) (failure to give a unanimity instruction is "deemed automatically [to be] of a constitutional magnitude.")

V. THE PROSECUTOR COMMITTED MISCONDUCT THAT WAS FLAGRANT AND ILL-INTENTIONED.

A. Standard of Review

Prosecutorial misconduct requires reversal if there is a substantial likelihood that it affected the verdict. *In re Glasmann*, ___ Wn.2d ___, 286 P.3d 673 (2012).¹¹ Even absent an objection, error may be reviewed if it is “so flagrant and ill intentioned that an instruction would not have cured the prejudice.” *Id.*, at ____.

Furthermore, prosecutorial misconduct may be argued for the first time on appeal if it is a manifest error that affects a constitutional right. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. *State v. Toth*, 152 Wn. App. 610, 615, 217 P.3d 377 (2009). The burden is on the state to show harmlessness beyond a reasonable doubt. *State v. Irby*, 170 Wn.2d 874, 886, 246 P.3d 796 (2011).

¹¹ Citations are to the lead opinion in *Glassman*. Although signed by only four justices, the opinion should be viewed as a majority opinion, given that Justice Chambers “agree[d] with the lead opinion that the prosecutor’s misconduct in this case was so flagrant and ill intentioned that a curative instruction would not have cured the error and that the defendant was prejudiced as a result of the misconduct.” *Glasmann*, at ____ (Chambers, J., concurring). Justice Chambers wrote separately because he was “stunned” by the position taken by the prosecution. *Id.*

B. The convictions must be reversed because the prosecutor engaged in misconduct that was flagrant and ill-intentioned.

The state and federal constitutions secure for an accused person the right to a fair trial. *Glasmann*, at ____; U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. art. I, §22. Prosecutorial misconduct can deprive an accused person of this right. *Glasmann*, at ____.

The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); Wash. Const. art. I, §21 and 22. The due process clause affords a similar protection. U.S. Const. XIV; *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

It is misconduct for a prosecutor to vouch for evidence, or to give a personal opinion on the guilt of the accused. *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984). A prosecutor may not ““throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.”” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)).

The state constitution further guarantees an accused person “the right to appear and defend in person... [and] to meet the witnesses against

him face to face.” Wash. Const. art. I, §22. These state constitutional rights are broader than their federal counterparts, in that Washington prosecutors are prohibited from making certain arguments that are permissible under the federal constitution.¹² *State v. Martin*, 171 Wn.2d 521, 533-536, 252 P.3d 872 (2011). In *Martin*, the Supreme Court rejected the federal standard, and specifically adopted a standard based on Justice Ginsburg’s dissent in *Portuondo*. *Martin*, at 533-536 (citing *Portuondo*, at 76-78 (Ginsburg, J., dissenting)).

The *Martin* court quoted extensively from Justice Ginsburg’s opinion, noting that she “criticized the majority for ‘transform[ing] a defendant’s presence at trial from a Sixth Amendment right into an automatic burden on his credibility.’” *Martin*, at 534 (quoting *Portuondo*, at 76 (Ginsburg, J., dissenting)). Importantly, the *Martin* court highlighted Justice Ginsburg’s opinion “that a prosecutor should not be permitted to make such an accusation during closing argument because a jury is, at that point, unable to ‘measure a defendant’s credibility by evaluating the defendant’s response to the accusation, for the broadside is fired after the defense has submitted its case.’” *Martin*, at 534-35 (quoting *Portuondo*, at 78 (Ginsburg, J., dissenting)).

¹² The U.S. Supreme Court allowed such arguments in *Portuondo v. Agard*, 529 U.S. 61, 120 S.Ct. 1119, 146 L.Ed.2d 47 (2000).

Here, the prosecutor told jurors (a) that he'd just learned of Mr. Phelps's defense (implying that the defense had been forced to change theories based on the evidence), and (b) that defense counsel wasn't present for an interview with A.A. and thus had "no idea of context was of the interview [sic]," that defense counsel "doesn't even know what the notes were about," and that the prosecution was "obligated to give [the notes] to him." RP 1580, 1582. There was, of course, no evidence supporting any of these statements. *See* RP *generally*.

The prosecutor concluded that defense counsel was "grasping at straws to get anything." RP 1582. This was not argument based on facts introduced at trial; instead it was an improper statement of the prosecutor's personal opinion. By making this statement, the prosecutor effectively testified, throwing "the prestige of his public office ... into the scales against the accused." *Monday, at 677* (citation and internal quotation marks omitted.)

The prosecutor's misconduct was flagrant and ill-intentioned. *Glasmann, at ____*. It pervaded the entire closing argument, thus an objection could not have cured any prejudice. *Id.* Accordingly, the conviction must be reversed and the case remanded for a new trial. *Id.*

VI. MR. PHELPS WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, art. I, §22. of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. art. I, §22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, falling below an objective

standard of reasonableness; and (2) that the deficient performance resulted in prejudice - “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.”).

- C. Mr. Phelps was denied the effective assistance of counsel by his attorney’s failure to object to prosecutorial misconduct that was flagrant and ill intentioned.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances:

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to

make an appropriate curative instruction or, if necessary, declare a mistrial.

Hodge v. Hurley, 426 F.3d 368, 386 (6th Cir., 2005).

Here, defense counsel should have objected to the prosecutor's flagrant and ill-intentioned misconduct. The prohibitions against prosecutorial "testimony" and statements of personal opinion are well established. By failing to object, counsel's performance thus fell below an objective standard of reasonableness. At a minimum, Mr. Phelps's lawyer should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

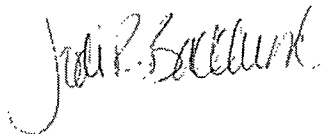
Furthermore, Mr. Phelps was prejudiced by the error. The prosecutor's improper comments substantially increased the likelihood that jurors would vote guilty based on improper factors. *See Glasmann, at ____*. The failure to object deprived Mr. Phelps of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Hurley*. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, the convictions must be reversed. Count one must be remanded for a new trial; count two must be dismissed without prejudice. If count two is not dismissed, it must be remanded for a new trial.

Respectfully submitted on February 26, 2013,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Todd Phelps, DOC #357684
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 26, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

Appendix E

Unpublished Opinion, COA No. 43557-8-II

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STATE OF WASHINGTON

BY: 
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TODD DALE PHELPS,

Appellant.

No. 43557-8-II

UNPUBLISHED OPINION

LEE, J. — In 2012, a jury found Todd Dale Phelps guilty of third degree rape and second degree sexual misconduct with a minor. Phelps appeals, arguing: (1) the trial court violated his and the public's right to an open and public trial during jury selection, (2) the trial court violated his right to be present during jury selection, (3) the information charging Phelps with second degree sexual misconduct with a minor was deficient, (4) the trial court failed to give a unanimity instruction for the second degree sexual misconduct with a minor charge, (5) the prosecutor committed misconduct during closing arguments, and (6) Phelps's trial counsel was ineffective for failing to object to prosecutorial misconduct during closing arguments. We affirm.

FACTS

A. Background

In the summer of 2010, 16-year-old AA¹ played fastpitch softball on a travelling team with Todd Phelps's 18-year-old daughter. Phelps served as an assistant coach on the team. Because AA's family could not travel to her tournaments that summer, she generally travelled with the Phelpses and came to think of them as a "second family." 3 Report of Proceedings (RP) at 444. AA often stayed the night at the Phelps's home and viewed Phelps as a role model and father figure.

AA began experiencing personal issues during the summer that continued into the fall of her sophomore year. She cut herself, experienced depression, tried drugs, and contemplated suicide.

In the spring of 2011, AA began playing softball for the Pe Ell High School team. Phelps was a paid employee of the school, working as an assistant softball coach. Having heard rumors about AA's drug usage, Phelps confronted her during softball practice in March 2011. AA told Phelps about some of her personal issues, but later indicated through social media that she wanted to talk with him more.

On March 26, Phelps drove AA to watch a softball game between two rival schools. Before returning her home, Phelps stopped in a Pe Ell church parking lot to speak with AA. During their conversation in the car, Phelps graphically recounted to AA a number of his sexual experiences over the years. According to AA, Phelps related these stories so that she would have "dirt on him" and, in turn, she could trust him with her problems. 3 RP at 457. Phelps told AA

¹ To provide some confidentiality in this case, we use initials in the body of the opinion to identify the minor victim.

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that he was going to help her get through her problems but, in return, she would need to repay him sexually once she turned 18. Phelps also told AA he would start texting her to make sure she was not cutting herself. When Phelps finally dropped AA at home, he instructed her to tell her parents that she was late getting home because they had stopped to eat.

Over the next few months, Phelps and AA texted each other thousands of times, often using other people's phones, and also communicated frequently through social media and e-mail. AA's parents and school officials became aware of Phelps's frequent communications with AA, and ultimately, Phelps was forced to resign his coaching position because of his involvement with AA. Additionally, Phelps engaged in the following conduct with AA during this time:

On April 2, Phelps engaged in sexual contact with AA.

On April 6, Phelps kissed AA.

On April 9, 12 and April 21, Phelps inappropriately touched AA.

On July 27, Phelps engaged in sexual intercourse with AA.

In September, AA disclosed having sexual intercourse with Phelps to her family. AA's father reported the incident to police.

B. Procedure

On November 10, 2011, the State charged Phelps with third degree rape and second degree sexual misconduct with a minor. The State later amended the information to include two aggravating circumstances for the third degree rape charge: (1) that Phelps used his position of trust to facilitate the rape and (2) that AA was a particularly vulnerable victim.

Jury selection for Phelps's trial began on April 17, 2012. Prior to voir dire beginning, the court informed the parties that it would conduct hardship questioning at the beginning of voir

dire, reserve its ruling until just before peremptory challenges, then "inform counsel as to who will be excused." 1 RP (Voir Dire) at 3.

During voir dire, juror no. 28 indicated that serving on the jury would be an inconvenience because he had previously committed to chaperoning a trip. Juror no. 48 told the trial court that serving on the jury would create a hardship because he was the only income-earner in his household and his employer would not pay for jury duty. Without having excused either juror, the court then indicated that it would revisit hardship excusals later.

The trial court then questioned jurors about potential conflicts or bias. 1 RP (Voir Dire) at 8-10. The court asked whether any of the potential jurors had "read or heard anything about this matter," whether "what you heard or read [has] caused you to form any opinions that would affect your ability to sit as a fair and impartial juror," and whether anyone was "acquainted with the parties, their attorneys, or the potential witnesses." 1 RP (Voir Dire) at 9. Juror no. 62 raised his hand in response to all three questions.

During the State's voir dire, juror no. 62 stated:

I live in the town of Pe Ell. I know almost every person on [the witness] list. I know them from church. I know—my wife worked at the school, coached some of these girls. And I run the day care which has some of the family members there.

1 RP (Voir Dire) at 20. The following exchange then occurred:

[The Court]: . . . [C]ould I interrupt just for a moment?

[The State]: Yes.

[The Court]: Juror 62 was actually excused from this case earlier and I thought he knew that. You're Mr. Kephart; is that right?

[Juror no. 62]: Yes, sir.

[The Court]: Yes.

[Juror no. 62]: I was. But you also told me I had to come and go through the process, so I'm here.

[The Court]: I think we had a miscommunication. But you told me all of those things and I thought. . . Well, at any rate, your [sic] excused today—

1 RP (Voir Dire) at 21-22. Following a sidebar, voir dire continued with both parties eliciting responses from the venire. The parties then had a sidebar discussion to pick the jury. Juror no. 28 and 48 were not selected for the jury.

Phelps's jury trial began later that day. AA testified to the incidents described above and, specifically, that she did not consent to the July 27, 2011 sexual intercourse with Phelps. On cross-examination, Phelps's attorney questioned AA about whether she told prosecutors that she had consented to the intercourse:

[Defense Attorney]: During one of your interviews or maybe more than one interview with [the prosecutor], did you tell her that you used the word rape later but the sex was consensual or that you consented?

[AA]: No, I don't remember saying that.

[Defense Attorney]: All right. And let me follow that up. When you tell us "I don't remember saying that," does that mean that you could have told [the prosecutor] that?

[AA]: Because when it first happened I tried to make myself believe it was consensual anyways because I didn't want [Phelps]—I didn't want that to be who he was because, in all honesty, I really, really, really, really respected him. I didn't want this to happen. I didn't want to have to do this. But no, I don't remember ever saying that. But because of the fact that I tried to make myself believe that it was consensual, and there is a chance I probably could have said that.

5 RP at 880.

After the State rested, Phelps had four witnesses testify on his behalf: his mother, his wife, his daughter, and his sister-in-law. Phelps's mother testified that Phelps was with her at the time of the charged sexual misconduct on April 2. Phelps did not testify.

During closing arguments, Phelps's attorney argued that AA either consented to sexual intercourse with Phelps or that the July 27 incident never occurred. In its closing rebuttal, the

State commented that, “I got to be quite honest with you today, I didn’t know the defense was one of consent.” 8 RP at 1580. Following this, the State argued without objection that, even if a deputy prosecutor had written a note about consent during an interview with AA, the defense attorney was not there at the time and “has no idea of [what the] context was of the interview. He doesn’t even know what the notes were about, but we’re obligated to give them to him.” 8 RP at 1582. The State then argued that looking at all the evidence—especially AA’s trial testimony—it was clear that AA did not consent to sexual intercourse.

The jury found Phelps guilty of second degree sexual misconduct with a minor and third degree rape and also found, as aggravating factors to the rape conviction, that AA was particularly vulnerable and that Phelps used his position of trust to facilitate the rape. Phelps appeals.

ANALYSIS

A. PUBLIC TRIAL RIGHT

Phelps first argues that the trial court violated his and the public’s right to a public trial when it privately excused jurors during voir dire and held various in-camera proceedings throughout trial. Because Phelps fails to meet his burden of establishing that public trial violations occurred, we disagree.

1. Standard of Review

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee a defendant the right to a public trial. *State v. Wise*, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). This court reviews alleged violations of the public trial right de novo. *Wise*, 176 Wn.2d at 9.

Generally, a trial court must conduct the five-part test set forth in *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), to determine if a closed proceeding is warranted.² However, “not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure if closed to the public.” *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012). Accordingly, the threshold determination when addressing an alleged violation of the public trial right is whether the proceeding at issue even implicates the right. *Sublett*, 176 Wn.2d at 71.

In *Sublett*, the Washington Supreme Court adopted a two-part “experience and logic” test to address this issue: (1) whether the place and process historically have been open to the press and general public (experience prong), and (2) whether the public access plays a significant

² The five criteria in *Bone-Club* are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a ‘serious and imminent threat’ to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (alteration in original) (quoting *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

positive role in the functioning of a particular process in question (logic prong).³ 176 Wn.2d at 72-73. Both questions must be answered affirmatively to implicate the public trial right. *Sublett*, 176 Wn.2d at 73. If the public trial right is implicated, reviewing courts then look at whether a closure actually occurred without the requisite *Bone-Club* analysis. *State v. Paumier*, 176 Wn.2d 29, 35, 288 P.3d 1126 (2012). If a closure has occurred, “[f]ailure to conduct the *Bone-Club* analysis is structural error warranting a new trial.” *Paumier*, 176 Wn.2d at 35.

2. Jurors no. 28 and 48

Phelps contends that the “record does not reflect how or when [jurors no. 28 and 48] were excused” and, accordingly, we should *assume* the trial court violated his right to an open and public trial. Br. of Appellant at 13. We reject this argument because it misrepresents the record in this case, and on appeal, Phelps carries the burden to demonstrate that a public trial violation occurred.

We have previously addressed the burden of proof on appeal for a public trial violation claim. In both *State v. Halverson*, 176 Wn. App. 972, 977, 309 P.3d 795 (2013), *review denied*, 179 Wn.2d 1016 (2014), and *State v. Miller*, 179 Wn. App. 91, 316 P.3d 1143 (2014), we stressed that the appellant bears the burden of establishing a public trial violation. In every public trial right case cited by Phelps in his briefing, the record clearly established a courtroom closure.

³ Although only four justices signed the lead opinion in *Sublett*, a majority adopted the “experience and logic” test with Justice Stephens’s concurrence. 176 Wn.2d at 136 (Stephens, J., concurring). More recently, our Supreme Court cited *Sublett* in unanimously applying the “experience and logic” test in *In re Personal Restraint of Yates*, 177 Wn.2d 1, 28-29, 296 P.3d 872 (2013).

For example, in *Bone-Club*, the trial court expressly ordered a courtroom closure during a pretrial suppression hearing. 128 Wn.2d at 256. Also, in *State v. Brightman*,⁴ *In re Pers. Restraint of Orange*,⁵ and *State v. Njonge*,⁶ the trial court explicitly ordered closures or told the public that they could not attend voir dire proceedings because of space and security concerns. And in *State v. Leyerle*, 158 Wn. App. 474, 477, 242 P.3d 921 (2010), the record clearly reflected (and both parties agreed) that the trial court and both parties questioned a potential juror in a hallway outside the courtroom. Finally, in *Paumier*, 176 Wn.2d at 33, *Wise*, 176 Wn.2d at 7, and *State v. Strode*, 167 Wn.2d 222, 224, 217 P.3d 310 (2009), the trial court individually questioned jurors in camera during voir dire. In all these cases, the appellate record clearly established that the public was inappropriately excluded from some portion of a public trial.

Here, in contrast, nothing in the record establishes that a closure occurred during voir dire or that jurors no. 28 and 48 were privately questioned or dismissed from the jury pool. Before voir dire commenced, the trial court stated that “if there are people, as I assume there will be, indicating that the length of the trial is a problem, I will do the questioning on that and then reserve ruling until I see—until just before peremptory challenges and I’ll inform counsel as to who will be excused and who will be retained.” 1 RP at 3.

During voir dire, jurors no. 28 and 48 both indicated that the timing and length of the trial would be a hardship. Just as the trial court indicated, it refrained from excusing these jurors at

⁴ 155 Wn.2d 506, 511, 122 P.3d 150 (2005).

⁵ 152 Wn.2d 795, 802, 100 P.3d 291 (2004).

⁶ 161 Wn. App. 568, 571-72, 255 P.3d 753 (2011), *review granted*, No. 86072-6 (Wash. Apr. 8, 2013)

this preliminary phase of voir dire. Instead, the record reflects that juror no. 28 was actively involved during voir dire, and that juror no. 48 was at least mentioned at the end of voir dire.

At the close of voir dire, the parties had a sidebar discussion to exercise peremptory challenges and pick the jury. Jurors no. 28 and 48 were not selected for the jury. The record does not reflect that jurors no. 28 and 48 were excused outside of the courtroom or that any type of courtroom closure occurred. Because the record does not establish that jurors no. 28 and 48 were excused during a closed proceeding, Phelps has failed to meet his burden of establishing a public trial violation.

To the extent that Phelps argues that a public trial right violation occurred when the parties selected the jury at sidebar, this argument has been rejected. In *State v. Love*, 176 Wn. App. 911, 920, 309 P.3d 1209 (2013), Division Three of this court held that “[n]either prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public,” and “the trial court did not erroneously close the courtroom by hearing the defendant’s for cause challenges at sidebar.” 176 Wn. App. at 920. In so holding, the *Love* court reasoned that logic “does not indicate that [cause or peremptory] challenges need to be conducted in public,” and that, with regard to *Sublett*’s experience prong, “over 140 years of cause and peremptory challenges in this state” showed “little evidence of the public exercise of such challenges, and some evidence that they are conducted privately.” *Love*, 176 Wn. App. at 919. We adopt the reasoning of the *Love* court and hold that exercising for cause challenges at sidebar during jury selection does not implicate the public trial right.⁷

⁷ In *State v. Dunn*, ___ Wn. App. ___, 321 P.3d 1283 (2014), we adopted the reasoning of the *Love* court and held that exercising peremptory challenges at the clerk’s station does not implicate the public trial right.

3. Juror no. 62

Phelps next argues that the colloquy between the trial court and juror no. 62 “suggests that jurors were questioned and excused behind closed doors.” Br. of Appellant at 13. Phelps further argues that although juror no. 62 was excused for cause on the record in open court, we should assume a public trial violation occurred before or during voir dire.

This argument again misstates the defendant’s burden of proof on appeal for a public trial violation claim. While Phelps is correct that in camera or outside-of-the-courtroom questioning of venire members may violate the public trial right, it is Phelps’s burden to establish a violation and perfect the record for appellate review. *Miller*, 179 Wn. App. ____ at ¶ 14, 316 P.3d at 1148.

Here, the record is unclear as to when, where, or why the trial court previously spoke with juror no. 62. Thus, this claim relies, at least in part, on facts outside the record on appeal, and we do not address issues on direct appeal that rely on facts outside the record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Accordingly, we hold that, on the record before us, Phelps has not established that a public trial right violation occurred in regard to the questioning of juror no. 62.

4. Other Proceedings

Phelps next argues that “[t]he trial court erroneously held additional in camera hearings without undertaking *Bone-Club* analysis.” Br. of Appellant at 14. But Phelps fails to adequately explain what these in camera proceedings concerned, whether they implicated the public trial right, and how any violation of the public trial right occurred. We do “not consider conclusory arguments unsupported by citation to authority.” *State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012), review denied, 176 Wn.2d 1014 (2013); see also RAP 10.3(a)(6). “Such

‘[p]assing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.’” *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)). Accordingly, we refrain from addressing this argument.

B. RIGHT TO BE PRESENT

Phelps next argues that the trial court “violated his Fourteenth Amendment right to be present at all critical stages of trial” by excusing jurors in his absence. Br. of Appellant at 17. Because nothing in the record reflects that the trial court excused jurors in Phelps’s absence, we disagree.

Whether a defendant’s constitutional right to be present has been violated is a question of law reviewed de novo. *State v. Irby*, 170 Wn.2d 874, 880, 246 P.3d 796 (2011). A criminal defendant has a constitutional right to be present at all critical stages of the proceedings. *Irby*, 170 Wn.2d at 880. “[A] defendant has a right to be present at a proceeding ‘whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge.’” *Irby*, 170 Wn.2d at 881 (quoting *Snyder v. Mass.*, 291 U.S. 97, 105-06, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). “The core of the constitutional right to be present is the right to be present when evidence is being presented.” *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994). “A violation of the due process right to be present is subject to harmless error analysis.” *Irby*, 170 Wn.2d at 885. “[T]he burden of proving harmlessness is on the State and it must do so beyond a reasonable doubt.” *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983)).

Here, Phelps argues that “[a]t some point, the trial court questioned and excused jurors outside the courtroom” and, this process “affected the makeup—and hence the fairness—of the jury that presided over [his] fate.” Br. of Appellant at 18. As explained above, nothing in the record suggests that any jurors were dismissed in Phelps’s absence. Jurors no. 28 and 48 were excused for cause in open court, in Phelps’s presence. And juror no. 62 was excused for cause on the record in open court. Phelps has failed to meet his burden of establishing error.

To the extent that Phelps argues that his right to be present was violated because jurors were dismissed at sidebar, this claim also fails. Here, the record is not clear as to whether Phelps was present when the attorneys exercised their for cause challenges at sidebar. Phelps was present during voir dire, and it appears that Phelps’s claim is based on the allegation that he did not join counsel at sidebar when they exercised for cause challenges.⁸ There is no indication in the record that he did or did not accompany counsel when counsel exercised for cause challenges at sidebar. Because the record is unclear whether Phelps was present at sidebar during the exercise of for cause challenges, the claim relies, at least in part, on facts outside the record on appeal. We do not address issues on direct appeal that rely on facts outside the record. *McFarland*, 127 Wn.2d at 335.

C. DEFICIENT CHARGING DOCUMENT

Phelps next argues that the information charging him with second degree sexual misconduct with a minor was deficient because it failed to allege that AA was not more than 21 years old at the time of the offense. Because this apparently missing element may be fairly implied from the charging document, we disagree.

⁸ Phelps has presented no authority that “being present” requires standing beside counsel during a sidebar.

We review challenges to the sufficiency of a charging document *de novo*. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). When, as here, a defendant challenges an information's sufficiency for the first time on appeal, we liberally construe the document in favor of validity. *State v. Kjorsvik*, 117 Wn.2d 93, 105, 812 P.2d 86 (1991). "Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied." *Kjorsvik*, 117 Wn.2d at 109. This court's standard of review comprises an essential-elements prong and an actual-prejudice prong. *Kjorsvik*, 117 Wn.2d at 105. Under the essential-elements prong, the reviewing court looks to the information itself for *some* language that gives the defendant notice of the allegedly missing element of the charged offense. *Kjorsvik*, 117 Wn.2d at 105-06. If that language is vague or inartful, then this court determines under the actual-prejudice prong whether such language prevented the defendant from receiving actual notice of the charged offense, including the allegedly missing element. *Kjorsvik*, 117 Wn.2d at 106.

Here, the third amended information states:

On or about and between March 25, 2011 through April 3, 2011, in the County of Lewis, State of Washington, the above-named defendant, (b) being at least sixty (60) months older than the student and being a school employee and not being married to the student and not being in a state registered domestic partnership with the student, did have, or knowingly cause another person under the age of eighteen (18) to have, sexual contact with a registered student of the school who is at least sixteen (16) years old, to-wit: [AA] (DOB: [1994]); contrary to the Revised Code of Washington 9A.44.096.

Clerk's Papers (CP) at 43.

To convict Phelps of second degree sexual misconduct with a minor, the State had to prove beyond a reasonable doubt that (1) Phelps had sexual contact with AA, (2) AA was at least 16 at the time of the contact but younger than 21, (3) AA was not married to Phelps, (4) Phelps

was at least 60 months older than AA at the time of the sexual contact, (5) Phelps was employed by the school, and (6) AA was an enrolled student of the school employing Phelps. RCW 9A.44.096.

Phelps argues that the charging document is insufficient under the essential-elements prong of the *Kjorsvik* test because it failed to explicitly state that AA was younger than 21 at the time of the crime. Although inartfully written, the State's charging document plainly states AA's date of birth, indicating that she was 16 at the time of the alleged sexual misconduct. Moreover, the document lists the charged crime itself as "sexual misconduct with a minor in the second degree," implying the involvement of a "minor."⁹ CP at 43. Keeping in mind the liberal standard in *Kjorsvik*, it is clear that, whether the age of majority specific to these circumstances was 18 or 21, Phelps had notice that the charged crime involved sexual contact with someone younger than the age of majority. Accordingly, the missing element can be "fairly implied" in these circumstances. *Kjorsvik*, 117 Wn.2d at 104.

Although the missing element can be fairly implied, we must determine under the actual-prejudice prong whether the defendant can "show that he or she was nonetheless actually prejudiced by the inartful language which caused lack of notice." *Kjorsvik*, 117 Wn.2d at 106. Here, Phelps cannot establish prejudice.

Even if the charging document explicitly stated that the victim must be under 21 years of age, Phelps's potential defenses (consent or alibi) were not affected as it was undisputed throughout trial that AA was 16 years old at the time the alleged sexual misconduct occurred.

⁹ Although "minor" is not defined in RCW 9A.44.096, under Washington law "[e]xcept as otherwise specifically provided by law, all persons shall be deemed and taken to be of full age for all purposes at the age of eighteen years." RCW 26.28.010. RCW 9A.44.096 is one of the rare exceptions where it is possible for someone over 18 to be treated as a minor.

“The primary goal of the essential elements rule is to give notice to an accused of the nature of the crime that he must be prepared to defend against.” *State v. Lindsey*, 177 Wn. App. 233, 245, 311 P.3d 61 (2013) (citing *Kjorsvik*, 117 Wn.2d at 101). Therefore, based on facts in this record, whether Phelps thought he was defending against the charge that he had inappropriate sexual contact with a 16-year-old or with someone under the age of 18 or under the age of 21 is immaterial. Accordingly, Phelps has failed to show that he was prejudiced by the inartful language in the charging document, and Phelps’s argument fails.

D. UNANIMITY INSTRUCTION

Phelps next argues that the trial court violated his right to a unanimous jury verdict by failing to give a unanimity instruction for the second degree sexual misconduct with a minor charge. Specifically, he argues that the State “presented evidence that Mr. Phelps had sexual contact with [AA] on multiple occasions.” Br. of Appellant at 23. While it is true that the State presented evidence of multiple acts of sexual misconduct in this case, the jury instructions clearly indicated that the charged crime only involved acts “on or about and between March 26, 2011 through April 2, 2011.” CP at 152. At trial, the only evidence presented of sexual contact during this time frame involved the April 2 incident. Accordingly, no election or unanimity instruction was required.

We review alleged instructional errors de novo. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). “Criminal defendants in Washington have a right to a unanimous jury verdict.” *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Accordingly, when the State presents evidence of multiple acts that could each form the basis of one charged crime, “either the State must elect which of such acts is relied upon for a conviction or the court must

instruct the jury to agree on a specific criminal act.” *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). This requirement “assures a unanimous verdict on one criminal act” by “avoid[ing] the risk that jurors will aggregate evidence improperly.” *Coleman*, 159 Wn.2d at 512. “Where there is neither an election nor a unanimity instruction in a multiple acts case, omission of the unanimity instruction is presumed to result in prejudice.” *Coleman*, 159 Wn.2d at 512. Reversal is required unless we determine the error is harmless beyond a reasonable doubt. *Coleman*, 159 Wn.2d at 512.

Here, the trial court instructed the jury that, to convict Phelps of second degree sexual misconduct with a minor, the State needed to prove beyond a reasonable doubt “[t]hat on or about and between March 26, 2011 through April 2, 2011, the defendant had sexual contact with [AA].” CP at 152. The trial court defined “sexual contact” as:

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party. Contact is “intimate” if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper.

When considering whether a particular touching is done for the purpose of a gratifying sexual desire, you may consider among other things the nature and the circumstances of the touching itself.

CP at 153.

At trial, the State presented evidence of only one incident involving sexual contact between AA and Phelps *during the date range in question*. This was the April 2 incident where Phelps straddled AA while she was on his bed, kissed her on the lips, put his tongue in her mouth, and ground his erection between her legs. Because the State presented evidence of only one incident involving sexual contact between AA and Phelps during the date range in question,

it was not required to make an election, and the trial court did not err in refraining from giving a unanimity instruction in this situation.

Phelps also argues that a unanimity instruction was required because the State presented evidence of more sexual misconduct after April 2. This argument is unavailing. As already discussed, the State charged Phelps with committing sexual misconduct between a specified date range, March 26 to April 2, and the jury instructions repeated that the jury had to find that the misconduct occurred during that date range. We presume that juries follow the trial court's instruction. *State v. Hanna*, 123 Wn.2d 704, 711, 871 P.2d 135, *cert. denied*, 513 U.S. 919 (1994). Accordingly, while the State admittedly presented evidence of other acts involving sexual contact, none of those acts took place in the specified date range and could not have been the basis for the jury's conviction on the sexual misconduct charge.

E. PROSECUTORIAL MISCONDUCT

Phelps last argues that the prosecutor committed misconduct during closing argument. We disagree.

To prevail on a prosecutorial misconduct claim, the defendant must establish “that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)). We look to “the evidence presented, ‘the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury’” when looking at the context of the entire record. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (quoting *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006)). Moreover, a defendant’s failure to object to an

improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012).

During closing statements, Phelps's attorney argued to the jury that:

You can find [Phelps] not guilty for the rape for two reasons. There was no rape and [Phelps] wasn't there. And I'm going to give you arguments for both. [AA] tells us that she disclosed to her aunt, disclosed to her mom and dad, and disclosed to [police] that she had sexual intercourse with Todd Phelps.

And on cross-examination, I asked her about some of that stuff. And on some of my questions she agreed, "I didn't say no." And she can come in here and testify this is the detailed sequence of events, but she can't get away from the other things she's already told her aunt and mom and dad and [police].

And then the prosecutor, why would the prosecutor have in her notes that [AA] said she consented? Why would the prosecutor have in her notes that [AA] said she consented if [AA] didn't consent?"...

....

And I guess during their conversations during their seemingly private conversations when she was talking with the prosecutor and not with me, she told them that it was consensual. She can't get away from that.

8 RP at 1571-72.

In its rebuttal, the State argued the following without objection,

I will be as brief as possible, but I definitely need to address these points that [defense counsel] has raised because I got to be quite honest with you today, I didn't know the defense was one of consent. So I guess [Phelps] was either there or he wasn't. If he was there, you are to believe that [AA] consented somehow. Well, let's work through that. So if you believe [AA] that [Phelps] was there, is there any evidence at all, at all, that [AA] consented?

The only evidence that [defense counsel] wants you to hang your hat on is that he had [AA] when she was cross-examined, say—agreed that . . . when she was giving a statement that she said, "No, I didn't stop him." But when I questioned her with regard to that as to when that conversation was in relation to, she was specific. It was after he had already entered her with his penis. She was clear about that. It was not beforehand. It was after.

....

Now, the other thing that [defense counsel] tries to discredit [AA] with regard to consent is some notes that the Prosecutor's Office had. He asked her, well, didn't you have an interview with the Prosecutor's Office? Unfortunately,

[defense counsel] wasn't there. He's grasping at straws to get anything. He has no idea of [what the] context was of the interview. He doesn't even know what the notes were about, but we're obligated to give them to him. Not dated.

.....
So which is it? Was [Phelps] there and he raped [AA] or had sex with her or he wasn't there?

8 RP at 1580-82.

Phelps contends that the prosecutor's statement that he did not realize that consent was at issue implied "that the defense had been forced to change theories based on the evidence." Br. of Appellant at 28. "[T]he prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel." *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994), *cert. denied*, 514 U.S. 1129 (1995) Here, a fair reading of the record does not reflect that the prosecutor's comment was "calculated to inflame the passions or prejudices of the jury." *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Instead, although the prosecutor was surprised¹⁰ by the defense's argument that AA had consented to sexual intercourse with Phelps and expressed that surprise in its brief comment, the prosecutor then went on to explain why the evidence could not support a theory of consent, especially in light of AA's extensive testimony. "It is not misconduct . . . for a prosecutor to argue that the evidence does not support the defense theory." *Russell*, 125 Wn.2d at 87.

Phelps also argues that the prosecutor's statement that defense counsel was "grasping at straws to get anything" while discussing AA's interview with the prosecutor's office was an

¹⁰ Throughout trial, Phelps's defense focused almost exclusively on establishing that Phelps could not have committed the rape when the State argued it occurred and, additionally, that no evidence of the rape remained at the crime scene.

inappropriate comment on the evidence and that this expressed the prosecutor's personal opinion about Phelps's guilt. 8 RP at 1582. This argument is unpersuasive.

First, Phelps's argument about consent relied exclusively on a handwritten note in the margin of a statement seemingly written by one of the prosecutors. It was appropriate for the prosecution to point out that defense counsel was not at the interview and could not know the context of the note or what the prosecutor was thinking when the note was written. *Russell*, 125 Wn.2d at 87. Second, the "grasping at straws" comment was clearly directed to defense counsel's theory of the case and did not reflect the prosecutor's personal view of Phelps's guilt or innocence. 8 RP at 1582. Phelps fails to establish prosecutorial misconduct in these circumstances.

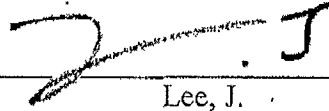
F. INEFFECTIVE ASSISTANCE OF COUNSEL

Phelps also argues that his trial counsel was ineffective for failing to object to the prosecutor's above-described statements in closing argument. To demonstrate ineffective assistance, a defendant must show that (1) defense counsel's representation was deficient because it fell below an objective standard of reasonableness; and (2) the deficient representation prejudiced the defendant because there is a reasonable probability that the result of the proceeding would have been different except for counsel's errors. *McFarland*, 127 Wn.2d at 334-35. Here, because Phelps fails to establish prosecutorial misconduct, he cannot show that his trial counsel was deficient for failing to object, and this argument necessarily fails.

No. 43557-8-II

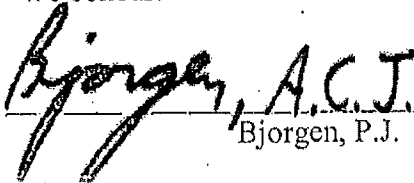
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Lee, J.

We concur:



Bjorgen, P.J.



Maxa, J.

Appendix F

Order Denying Review by the Supreme Court

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TODD DALE PHELPS,

Petitioner.

NO. 90552-5

ORDER

C/A NO. 43557-8

Department I of the Court, composed of Chief Justice Madsen and Justices C. Johnson, Fairhurst, Wiggins, and Gordon McCloud, considered at its January 6, 2015, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petitioner's motion to supplement the record is denied. The Respondent's second motion to strike is granted and the Petition for Review is denied.

DATED at Olympia, Washington this 7th day of January, 2015.

For the Court

Madsen, C.J.
CHIEF JUSTICE

Filed
Washington State Supreme Court

JAN - 7 2015
E CRF
Ronald R. Carpenter
Clerk

Appendix G

Mandate, COA Case No. 43557-8-II

Received & Filed
LEWIS COUNTY, WASH
Superior Court

JAN 20 2015

By Kathy A. Brack, Clerk
Deputy

tw

112

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

TODD D. PHELPS,
Appellant.

No. 43557-8-II

MANDATE

Lewis County Cause No.
11-1-00790-6

The State of Washington to: The Superior Court of the State of Washington
in and for Lewis County

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division II, filed on June 17, 2014 became the decision terminating review of this court of the above entitled case on January 7, 2015. Accordingly, this cause is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion. Costs and attorney fees have been awarded in the following amount:

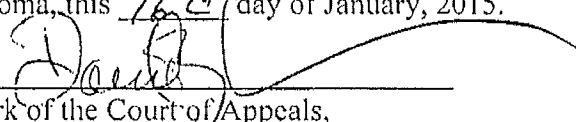
Judgment Creditor Respondent State: \$116.00

Judgment Creditor A.I.D.F.: \$9,704.979

Judgment Debtor Appellant Phelps: \$9,820.97



IN TESTIMONY WHEREOF, I have hereunto set
my hand and affixed the seal of said Court at
Tacoma, this 16th day of January, 2015.


Clerk of the Court of Appeals,
State of Washington, Div. II

MANDATE
43557-8-II
Page Two

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Hon. Nelson E. Hunt
Lewis Co Superior Court Judge
360 N.W. North Street
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Appendix H

Court's Instructions to the Jury

ENTERED COUNTY
CLERK OF SUPERIOR COURT, WASH
NOTED

APR 27 PM 4:50

KIM CRACK, CLERK

BY K
CITY

IN THE SUPERIOR COURT OF STATE OF WASHINGTON FOR LEWIS COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

TODD DALE PHELPS,

Defendant.

No. 11-1-00790-6

81

COURT'S INSTRUCTIONS TO THE JURY

DATE: APRIL 25, 2012

William E. Heard, Judge

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

No. 2

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

No. 3

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on the other count.

No. 4

A person commits the crime of sexual misconduct with a minor in the second degree when the person is a school employee who has sexual contact with an enrolled student of the school who is at least sixteen years old and not more than twenty-one years old and not married to the employee, and the employee is at least sixty months older than the student.

No. 5

To convict the defendant of the crime of sexual misconduct with a minor in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about and between March 26, 2011 through April 2, 2011, the defendant had sexual contact with Amanda K. Alden.

(2) That Amanda K. Alden was at least sixteen years old but not more than twenty-one years old at the time of the sexual contact and was not married to the defendant;

(3) That the defendant was at least sixty months older than Amanda K. Alden:

(4) That the defendant was a school employee;

(5) That Amanda K. Alden was an enrolled and registered student of the school; and

(6) That this act occurred in the State of Washington, county of Lewis.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 6

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party. Contact is "intimate" if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper.

When considering whether a particular touching is done for the purpose of a gratifying sexual desire, you may consider among other things the nature and the circumstances of the touching itself.

No. 7

For purposes of this instruction, "school" means a school that serves kindergarten through grade twelve, or any part thereof.

"School employee" means an employee of a school who is not also enrolled as a student at the school.

"Enrolled student" means any student enrolled at or attending a program hosted or sponsored by a school.

No. 8

A person commits the crime of rape in the third degree when he engages in sexual intercourse with another person not married to him when the other person did not consent to the sexual intercourse, and such lack of consent was clearly expressed by the other person's words or conduct.

No. 9

To convict the defendant of the crime of rape in the third degree, each of the following four elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about July 27, 2011, the defendant engaged in sexual intercourse with Amanda K. Alden;

(2) That Amanda K. Alden was not married to the defendant;

(3) That Amanda K. Alden did not consent to sexual intercourse with the defendant and such lack of consent was clearly expressed by words or conduct,

(4) That any of these acts occurred in the State of Washington, county of Lewis.

If you find from the evidence that ^{each of these has} ~~elements have~~ been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3), or (4), then it will be your duty to return a verdict of not guilty.

No. 10

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight or any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex, or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

No. 11

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

No. 12

A victim is "particularly vulnerable" if she is more vulnerable to the commission of the crime than the typical victim of Rape in the Third Degree. The victim's vulnerability must also be a substantial factor in the commission of the crime.

No. 13

A defendant uses a position of trust to facilitate a crime when the defendant gains access to the victim of the offense because of the trust relationship.

In determining whether there was a position of trust, you should consider the length of the relationship between the defendant and the victim, the nature of the defendant's relationship to the victim, and the vulnerability of the victim because of age or other circumstance.

No. 14

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

No. 15

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

No. 16

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and two verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in the verdict forms the words "not guilty" or the word "guilty", according to the decision you reach.

You will also be given a special verdict form for the crime of Rape in the Third Degree as charged in count I. If you find the defendant not guilty of Rape in the Third Degree, do not use the special verdict form. If you find the defendant guilty of this crime you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form

"yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously agree that the answer to the question is "no," or if after full and fair consideration of the evidence you are not in agreement as to the answer, you must fill in the blank with the answer "no."

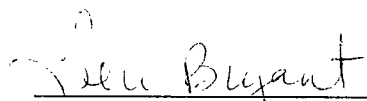
Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict form and notify the bailiff. The bailiff will bring you into court to declare your verdict.

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

IN THE PERSONAL)	NO. 48011-5-II
RESTRAINT PETITION OF:)	
)	
TODD DALE PHELPS,)	DECLARATION OF
)	MAILING
)	
Petitioner,)	
_____)	

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On January 28, 2016, petitioner, Todd Dale Phelps was served with a copy of the State's **Response to Personal Restraint Petition** via Division II upload to Suzanne Lee Elliott, attorney for petitioner at: Suzanne-elliott@msn.com.

DATED this 28th day of January, 2016, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

January 28, 2016 - 2:03 PM

Transmittal Letter

Document Uploaded: 2-prp2-480115-Response.pdf

Case Name:

Court of Appeals Case Number: 48011-5

Is this a Personal Restraint Petition? ☒ Yes ☐ No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: _____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

☒ Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

A copy of this document has been emailed to the following addresses:

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